

**Bond University**

## **DOCTORAL THESIS**

### **The Development of Consumer Protection Laws in Tanzania for Electronic Consumer Contracts**

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The Development of Consumer Protection Laws in Tanzania for  
Electronic Consumer Contracts

A thesis submitted in fulfilment of the requirements for the degree of  
Doctor of Philosophy (PhD)

By

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## Thesis Abstract

The advancement of technology and the development of electronic commerce have affected many fields of law, among them, consumer protection. Whereas the field of consumer protection has existed for many years, electronic commerce has made it necessary to rethink the available measures so as to fit with the current needs of consumer protection in the electronic world. Electronic commerce has raised a new dimension of consumers known as electronic consumers who can trade globally and across borders, and whose characteristics and nature have changed. Electronic consumers face many opportunities but also new risks and danger. They face new trends and practices which did not exist before. Consequently, the available laws addressing offline consumers inadequately address these new issues and hence are insufficient given the new characteristics and features emerging in electronic commerce and online transactions. There is clearly a need to examine current consumer protection measures to ensure they address the specific concerns that electronic consumers face when transacting electronically. This is the case in Tanzania.

Some jurisdictions and international communities have already realised the need to review electronic consumer protection and have come up with measures addressing issues concerning electronic consumers; however, some countries such as Tanzania have failed to undertake sufficient initiatives to address these concerns. Moreover, the available measures addressing electronic consumers from international and other jurisdictions may not fit with the situation in Tanzania or address the specific concerns of Tanzania consumers due to their unique issues. There is a need, therefore, to develop laws which address the specific practices and concerns of Tanzanian electronic consumers.

This thesis intends to highlight the development of electronic commerce in Tanzania and its effect on both local and cross border electronic consumers. This thesis will highlight the unique model of electronic commerce practices present in Tanzania which reflects the social, economic and cultural practices of its people; in particular, the distinctive integration of electronic commerce and mobile commerce, and by so doing establishing a distinctive paradigm of electronic market unique to Tanzania.

The study will also point out the changing roles of consumers especially when they engage through social media and social networks, the challenges that arise in such media, and the new position and role of small and medium enterprises given the advancement of electronic commerce. The lack of protection and inadequacy of the laws will be highlighted. There are uncertainties and gaps in applying existing consumer protection laws and principles that were developed for offline transactions to new challenges raised by online transactions, transactions in social networks and media. Those which are not addressed by existing laws will also be highlighted.

This thesis will analyse a selection of the available measures in protecting electronic consumers at a global, regional and local jurisdictional level. They will be analysed as to how well they address Tanzanian electronic consumer concerns and how they may fit within the Tanzanian scenario. Recommendations will be made as to the appropriate measures that Tanzania should take in promoting and protecting the welfare of electronic commerce consumers in the country.

# CERTIFICATE

This thesis is submitted to Bond University in fulfilment of the requirements for the Doctor of Philosophy degree.

This thesis represents my own work and contains no material which has been previously submitted for a degree or diploma at this University or any other institution, except where due acknowledgement is made.

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Theodora Mwenegoha

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## List of Abbreviations and Acronyms

ACCC - Australian Competition and Consumer Commission

ADR - Alternative Dispute Resolution

APEC - Asian Pacific Economic Cooperation

ASEAN - Association of South East Asian Nations

ASIC - Australian Securities and Investments Commission

ATMs - Automated Teller Machines

AU - African Union

B2B - Business to Business

B2C - Business to Consumer

B2G - Business to Government

BOT- Bank of Tanzania

C2C - Consumer to Consumer

CAP - Chapter

CCP - OECD Committee on Consumer Policy

CFI - European Court of First Instance

CGM - Computer Generated Media

CISG - UN Convention on Contracts for the International Sale of Goods

CRDB - Community Rural Development Bank

EAC - East African Community

ECA - Economic Commission for Africa

ECOWAS - Economic Community of West African States

EDI - Electronic Data Interchange

EFTPOS - Electronic Funds Transfer at Points of Sale

EPOCA - Electronic and Postal Communications Act

EU - European Union

EULA - End User License Agreement

EWURA - Energy and Waters Utilities Regulatory Authority

FCC - Fair Competition Commission

FTC - Fair Competition Tribunal

GDP - Gross Domestic Product

ICPEN - International Consumer Protection and Enforcement Network

ICT - Information Communication Technology

ICT4D - Information and Communication Technology for Development

IMF - International Monetary Fund

ISPs - Internet Service Providers

ITU - International Telecommunication Union

JALO - Judicature and Application of Laws Ordinance

NCAC - National Consumer Advocacy Council

NCC - National Consumer Council

NPP - National Privacy Principles

NSSF - National Social Security Funds

NTP - National Telecommunication Policy

ODR - Online Dispute Resolution

OECD - Organisation for Economic Co-operation and Development

OFT - Australian Office of Fair Trading

R.E - Revised Edition

SADC - Southern Africa Development Community

SET - Secure Electronic Transaction Protocol

SMEs - Small and Medium-sized Enterprises

SUMATRA - Surface and Marine Transport Regulatory Authority

TBA - Tanzania Bankers Association

TCAA - Tanzania Civil Aviation Authority

TCCIA - Tanzania Chamber Of Commerce, Industry and Agriculture

TCRA – Tanzania Communications Regulatory Authority

TIN - Tax Identification Number

TTMS - Telecommunication Traffic Monitoring System

UCITA - Uniform Computer Information Transactions Act

UETA - United State Uniform Electronic Transactions Act

UN - United Nations

UNCITRAL - United Nations Commission on International Trade Law

UNCTAD - United Nations Conference on Trade and Development

UNDP - United Nations Development Programme

US FTC - US Federal Trade Commission

WGEC - Working Group on Electronic Commerce

WTO - World Trade Organisation

WWW- World Wide Web

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# CHAPTER ONE

*Protecting the rights of even the least individual among us is basically the only excuse the government has for even existing.*

*Ronald Reagan<sup>1</sup>*

## **1. ONLINE CONSUMER PROTECTION IN TANZANIA: CONCEPTUAL AND LEGAL FRAMEWORK**

### **1.1 STATEMENT OF THE PROBLEM**

The characteristics and features of electronic commerce (e-commerce) are constantly changing as a result of the development of technology. This provides the consumer with easy access to a wider choice of market. Companies and consumers can exchange goods and services immediately and efficiently without the barriers of time or distance.

However, e-commerce has opened new challenges for consumer protection. Electronic consumers (e-consumers) are faced with more problems and can be more vulnerable than offline consumers. Moreover, e-commerce has taken on different characteristics in various countries, influenced by local practices. In particular, e-commerce has taken a new form in Tanzania. First, e-commerce in Tanzania is integrated with mobile commerce (m-commerce) resulting in a new electronic market (e-market) paradigm. Secondly, e-commerce in Tanzania is influenced by the social, cultural, and economic conditions making it unique to Tanzania.

New practices have also emerged where consumers have become sellers, content producers, advertisers and payment intermediaries. E-consumers assume this role when they engage in consumer to consumer (C2C) transactions. This is facilitated by the rise of consumer transactions in social media and networks, a practice which did

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<sup>1</sup> FixQuotes, *Facts about Ronald Reagan* < <http://fixquotes.com/authors/ronald-reagan.htm>>; Neil Ross, 'Where Do You Stand?', *The Federal Observer* (online), 23 April 2013 <<http://www.federalobserver.com/2012/04/24/where-do-you-stand/>>.

not previously exist. The development of e-commerce has blurred the line between consumers and sellers. Not only have e-consumers become sellers in C2C, but some businesses have become e-consumers; in particular, small and medium enterprises (SMEs). As a result they face similar challenges, such as unfair terms and conditions, breach of privacy, misleading and misrepresentation conduct, fraud and deception, financial loss, and the lack of opportunity to seek justice and enforce their rights due to the absence of suitable channels or the high costs involved. Consumers are faced with a lack of transparency and legal uncertainty.

Several measures have been taken to solve important legal issues arising from the development of electronic transactions (e-transactions) at an international level and within various jurisdictions. A number of jurisdictions have enacted legislation to deal with issues arising in e-commerce and set out the rules and regulations covering e-transactions. Most of the local e-commerce laws enacted have recognised and used the international regulations set forth such as the *United Nations Commission on International Trade Law (UNCITRAL) Model Law on Electronic Commerce*<sup>2</sup> and *UNCITRAL Model Law on Electronic Signatures*.<sup>3</sup>

However, there are jurisdictions that have taken few or no initiatives in regulating e-transactions and e-commerce. Among these is Tanzania. This situation is complicated further in Tanzania due to the status of consumer (both e-consumer and offline consumer) protection. Despite the available laws protecting consumers in Tanzania, the efforts have not been satisfactory.<sup>4</sup>

It is important that Tanzania address the concerns facing its e-consumers.<sup>5</sup> However, this cannot be done by merely adopting the available international and other jurisdiction measures as they do not sufficiently address the Tanzanian situation. The available laws do not reflect the unique features of e-commerce in Tanzania, and

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<sup>2</sup> GA Res 51/162, 51<sup>st</sup> sess, Agenda Item 148, UN Doc A/RES/51/162 (30 January 1997, adopted 12 June 1996).

<sup>3</sup> GA Res 56/80, 56<sup>th</sup> sess, Agenda Item 161, UN Doc A/RES/56/80 (24 January 2002, adopted 5 July 2001).

<sup>4</sup> This is discussed further in Chapter Three.

<sup>5</sup> The importance of providing sufficient measures for all consumers is acknowledged, and is further mentioned in Chapter Three and Chapter Six. However, emphasis is given to the protection of e-commerce as it is a new paradigm for Tanzanian protection and needs to be singled out in order to identify specific problems facing e-consumers and possible solutions.



hence, they are likely to be inefficient if adopted for Tanzanian e-consumers.

It suffices here to say that just as there is no one size fits all solutions to many problems in Africa<sup>6</sup>, this is also similar when addressing electronic consumer protection in Africa. Among the reasons for these solutions not to work are the social construction, contextual, and cultural contingents<sup>7</sup> of the problems facing African countries. Whereas, on the face it the problems of electronic consumer protection (and so many other problems) may seem to be similar issues and perhaps in the same context, solutions to these problems may only be effective if the problems are direct to the people's concerns and reflect their culture, social and economic context. This is not only true among African countries but within the countries themselves. For example, solutions for a same problem may need to be different when addressing people in rural Tanzania as opposed to those in the cities. It is with this reason that this work recognises and acknowledges that Tanzania problems are unique to Tanzania and can only be resolved if addressed with this context in mind. The context of Tanzania changes the concerns e-consumers face and hence raises the need for addressing these particular concerns. Past experiences have shown that imposing general solutions which have been catered in the philosophy of 'one size fits all' are not effective.<sup>8</sup> It is acknowledged however, that, there is more strength to solving the available electronic consumer problems if countries join forces at regional levels and address the concerns. However, in order for this to be effective, the problems need to be solved from the country level first, where the cultural, social and economic context will be taken into consideration.<sup>9</sup>

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<sup>6</sup> Vanessa Iwowo, 'Leadership Development: One Size Does Not Fit All Growing Leaders in Africa and Across the World' *The European Business Review* (Online) 22 May 2015 <<http://www.europeanbusinessreview.com/?p=7310>> accessed on 4/09/2015; Ronak Gopaldas, 'Why a 'one size fits all' approach will fail in Africa' *Business Day Live* (Online) 11 October 2013, <<http://www.bdlive.co.za/opinion/2013/10/11/why-a-one-size-fits-all-approach-will-fail-in-africa>> accessed on 4/09/2015; Jacqueline Muna Musiitwa, 'African solutions to African problems' <<http://thoughtleader.co.za/archbishops/tutufellows/2011/05/30/african-solutions-to-african-problems/>> accessed on 4/09/2015

<sup>7</sup> Vanessa Iwowo, 'Leadership Development: One Size Does Not Fit All Growing Leaders in Africa and Across the World' *The European Business Review* (Online) 22 May 2015 <<http://www.europeanbusinessreview.com/?p=7310>> accessed on 4/09/2015

<sup>8</sup> A good example of this is in the making of Tanzania general consumer protection law, which is discussed further in Chapter Five.

<sup>9</sup> For further reference on Tanzania social and cultural context please refer to Chapter Two below, in particular footnote 6 and 7.

Currently, e-consumers in Tanzania lack protection. This is not only due to the fact that there are no specific measures addressing electronic consumer protection, but also because generally, consumer protection is not satisfactory. As a result, consumers are rendered defenceless.

Moreover, it is important to address electronic consumer protection because e-consumers are rendered more vulnerable in the online environment and therefore deserve at least the same, if not better standards of protection that are offered to offline consumers. The nature and characteristics of e-commerce are different from offline commerce. E-consumers may be transacting with sellers from other countries without being aware they are doing so and have to go through technical features even for a simple transaction. E-consumers are exposed to higher levels of risks when they transact online than general consumers who engage in offline transactions. This raises the need to have adequate and satisfactory laws and regulatory bodies to govern and protect e-consumers.

It is important to clearly identify the roles and obligations of players in the Tanzanian e-market arena such as e-consumers and sellers in C2C transactions and the SMEs. It is also essential to determine and establish a proper protection mechanism for the relevant groups in the Tanzanian e-market.

This research intends to highlight the distinct e-commerce situation in Tanzania which has resulted in the integration of e-commerce and m-commerce, and to point out the new practices that are currently trending in the country, including C2C transactions. This thesis aims to identify the possible violations that e-consumers in Tanzania face when they engage in e-commerce. A number of measures are offered to adequately address the concerns identified by e-consumers in Tanzania.

## 1.2 OBJECTIVES, SIGNIFICANCE AND RESEARCH QUESTIONS

### **1.2.1 Research objectives**

This thesis explores the legal problems caused by the advance of technology, in particular, e-commerce, that leads to new consumer concerns and problems when they transact online. It seeks to find out any concerns and harm suffered by e-consumers in Tanzania. The thesis also considers concerns that arise in m-commerce as it is intertwined with e-commerce in Tanzania. This thesis highlights the unique features of e-commerce in Tanzania and the unique problems resulting from these features.

The research considers whether there are adequate legal measures and regulatory frameworks protecting e-consumers in Tanzania. Do they create a fair playing field for both businesses and e-consumers which in turn lead to social and economic development?

The purpose of this thesis is to draw the attention of lawmakers: to the need for reform and amendment of the current consumer protection laws; the need for comprehensive education of e-consumers on their rights and obligations; the need to empower e-consumers to make informed decisions but to also safeguard their online safety and welfare in general; the need to have independent consumer representative mechanisms that can voice consumer concerns and represent their interests; and the need to create commissions and other relevant bodies so as to safeguard and enhance online consumer protection.

This thesis also provides guidance to the lawmakers on the proper approach to be taken to address Tanzanian e-consumer concerns. The problems these e-consumers face need to be addressed by taking into consideration the social, economic and political influences and characteristics of the community. These characteristics and influences are highlighted and possible approaches in addressing them are offered.

The research also highlights Tanzanian e-consumer concerns when dealing with e-consumers from other jurisdictions and how to regulate cross border transactions.

The result of the thesis should be to bring awareness to both e-consumers and lawmakers on the status of e-consumers' welfare in Tanzania, the concerns and problems they face while engaging in e-commerce, the measures needed to address such concerns and how to implement and enforce these measures.

These objectives are clarified as follow:

***To state a new e-trade paradigm***

The practice of e-commerce in Tanzania is intertwined with m-commerce to the extent the two depend on each other. This gives rise to unique e-commerce features and distinctive problems. A question to consider is whether a new electronic trade paradigm has been born in Tanzania.

The uniqueness of e-commerce in Tanzania is further categorised by the C2C transactions which have also emerged with distinctive features. All of these features need to be identified so appropriate measures can be taken to address them.

***To identify possible gaps***

What are the possible gaps in regulations and laws available in countries like Tanzania? The existing laws, at both a national and international level do not satisfactorily protect online consumers.

***To explore new legal problems arising from online transactions, so as to suggest possible measures for reform***

Some of the problems that e-consumers face in the online environment are new. They were not foreseen by those who originally drafted laws covering offline commerce. As a result, the laws covering offline commerce are uncertain and unsatisfactory when applied to online transactions, hence the need for new laws.

Moreover, some of the problems that e-consumers in Tanzania face are unique to their community. They reflect their economic, social and cultural practices. These factors need to be reflected when addressing their concerns.

***To assess the adequacy of regulatory frameworks and available legal measures***

This thesis will assist policy and lawmakers by providing recommendations to fill the gaps that exist in current legislation. These gaps have led to a failure to protect consumers who transact electronically within the existing legal framework.

It also aims at bringing awareness to the lawmakers in Tanzania for the need to reform and amend the laws and create other relevant bodies, so as to safeguard and enhance online consumer protection. Consumers must be made aware of issues and concerns when engaging in online transactions and any possible measures they can take to overcome such concerns. This can be achieved through education, information campaigns and publications.

### ***1.2.2 Significance of the study***

This thesis identifies different problems and challenges which e-consumers in Tanzania face while transacting online, and the available measures and gaps that are present. The distinctive characteristics that exist in Tanzania e-commerce are identified and appropriate ways to address the situation are proposed.

This thesis elaborates how e-commerce and m-commerce are merged together to form a kind of electronic trade (e-trade) exclusive to Tanzania. It sheds light on how ideologies and beliefs shape electronic transactions within the country. The thesis further elaborates the distinct practices of C2C transactions, its challenges and why it cannot be ignored when addressing e-consumer concerns in Tanzania. It also highlights the key e-commerce role players in Tanzania including C2C consumers and SMEs.

The failure of current measures for general consumer protection in Tanzania is highlighted, and alternatives are provided on how to avoid these mistakes and to ensure successful measures for e-consumer protection.

Currently there is no study in Tanzania that measures the failure of consumer protection system in the country and which highlights the problems that have been identified in this thesis, or offers solutions which have been proposed in the study.

This thesis demonstrates originality in the ideas presented, problems identified and solutions offered.

The study provides ways and means to improve the welfare of e-consumers in the country. It raises consumer awareness and sensitises them on how to avoid or deal with concerns that they come across while transacting online which may lead to improved socio-economic development and assist in maintaining peace in the country. A government that does not deal with consumers' problems and does not take any measures in protecting them will find it difficult to maintain a democratically stable and peaceful economy. This thesis educates e-consumers on e-commerce and e-consumer protection and also informs lawmakers and adjudicators on the current issues e-consumers face, the gaps in the available laws and uncertainties the available laws may cause if applied to e-transactions.

The research is also significant as it not only provides guidance to Tanzanian lawmakers on how to address e-consumer cross border issues but it also assists other jurisdictions to understand the Tanzanian situation better and how to respond accordingly if necessary.

The thesis also offers possible ways of working with other jurisdictions to offer international protection and effective remedies for cross border consumers. This is vital in safeguarding e-consumer interests which may be similar despite the differences in these jurisdictions, for example, when dealing with the problem of fraud.

This thesis addresses violations and problems that e-consumers face, not only at the national level, but also at the international level. Proposed protection measures protect e-consumers in other jurisdictions as it will prevent the violators shielding themselves behind jurisdictions which lack legal consumer protection measures, while committing offences in cross border transactions.

In summary, this thesis is significant as it identifies distinct e-commerce characteristics, problems and measures to overcome them; it portrays uniqueness and originality of the study; it enhances e-consumers welfare and education and it

identifies opportunities for international and cross border protection measures.

### **1.2.3 Research questions**

This work is premised on the assumption that existing consumer protection laws are inadequate at addressing the issues arising from e-commerce in Tanzania; e-commerce being integrated with m-commerce to form a distinctive type of e-trade culture unique to Tanzania. This uniqueness is further enhanced by distinctive C2C online transactions.

The work is premised on the assumption that the integration of e-commerce and m-commerce in Tanzania and the distinctive paradigm it creates has not been recognised by the lawmakers and has not been addressed.

Moreover, the work is premised on the assumption that the existing consumer protection laws do not recognise the current major role players in the field of e-commerce including C2C consumers and SMEs. Consequently, C2C e-consumers concerns and SMEs concerns are not addressed.

The current legal framework of consumer protection did not foresee the problems and features brought about as a result of technological advances and new transactional arenas such as social media and networks. As a result, the legal framework is not broad enough to adequately protect e-consumers in Tanzania.

The nature and context of problems facing e-consumers in Tanzania is complex and influenced by cultural and social practices unique to that society. Consequently, the available national and international measures addressing e-consumer protection are unlikely to be satisfactory and will cause uncertainty if adopted to address e-consumer problems in Tanzania.

This thesis is premised on the assumption there is a lack of sufficient measures and means for e-consumers in Tanzania to seek justice and enforce their rights. The current legal system does not ensure justice for all. Moreover, those who are able to

seek justice are not guaranteed enforcement of those rights.

### 1.3 RESEARCH SCOPE

The research examines the protection of e-consumers and concerns arising from e-commerce in Tanzania. The research will be limited to addressing e-consumers who engage in e-commerce, however, the unique integration of e-commerce and m-commerce in Tanzania will be highlighted. The research will address distinctive features of e-commerce in Tanzania as identified throughout the research. These will include the integration of e-commerce and m-commerce, C2C e-transactions, transactions and involvement in social networks and blogs, and the position of SMEs as consumers. The research will clarify how these concerns need specific solutions and how this can be achieved while adopting the available measures addressing e-commerce transactions.

It is noted that e-commerce encompasses a wide range of transactions, but for the purpose of this research, only consumer e-transactions will be considered. The private aspect of e-commerce and electronic contracts (e-contracts) will not form the scope of this research. Issues such as electronic offers and acceptance, electronic formation of contracts and electronic signatures are not covered by this research. Similarly, issues such as electronic payments and electronic redress will be limited to the consumer protection aspect.

### 1.4 CONTRIBUTION OF THE RESEARCH

This thesis intends to point out distinctive features of e-commerce which exist in Tanzania. The research will highlight how e-commerce practices in the country form an e-trade exclusive to Tanzania, integrating e-commerce and m-commerce, which may point to a new paradigm in the e-market arena. The research will highlight e-commerce practices among the unbanked and low income population in Tanzania and what brings success in such practices. The research will also highlight how social, economic and culture ideologies influence e-commerce in Tanzania, and how the



ideologies of Ujamaa and Undugu<sup>10</sup> shape e-transactions in Tanzania.

Moreover, the thesis will point out distinctive e-commerce practices in C2C e-transactions, and concerns arising as a result. The influence and position of social media and networks in e-transactions in Tanzania and the role of SMEs in e-consumer protection will be discussed.

The above explained efforts will lead to the identification of distinctive e-commerce and e-transaction problems faced by e-consumers in Tanzania and highlight how Tanzania can address them. Suggestions on the adoption of international and other national initiatives while focusing the solutions on the local context will be offered.

One notable fact is that e-consumer protection is growing and new challenges arise every day. Some of these challenges have been addressed at other national and international levels. However, these initiatives and solutions cannot be sufficiently applied to Tanzania as they will not yield the intended results. This research will elaborate the problems of applying these initiatives to the Tanzanian e-consumer protection system and identify the context and norms that influence the application of the law. This analysis has not been previously carried out.

The thesis will also highlight the current general consumer protection condition in Tanzania, which is unsatisfactory. Possible reasons for its inadequacy will be identified and suggestions as to what should be done to avoid a similar failure in e-consumer initiatives will be offered.

As there are no specific laws governing e-consumer protection in Tanzania, this thesis will propose potential provisions that may be adopted.

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<sup>10</sup> Ujamaa is a Swahili word for brotherhood, reflecting African socialism beliefs while Undugu is an African philosophy of humanities, meaning a belief that a person is a person through other persons. See Mzukisi Yona, *Popular Histories of Independence and Ujamaa in Tanzania* (MA Thesis, University of the Western Cape, 2008) 6; D S Sigger, B M Polak and B J W Pennink, 'UBUNTU' or 'HUMANNESS' as a Management Concept Based on Empirical Results from Tanzania' (CDS Research Report No 29, University of Groningen, July 2010) 2-3 <<http://www.rug.nl/research/globalisation-studies-groningen/publications/researchreports/reports/ubuntuorhumanness.pdf>>. These terminologies are also defined in Chapter Two of the thesis.

In summary, this thesis will have much to contribute to the field of e-commerce and e-consumer protection as new e-trade practices and features creating such practices will be revealed. The problems arising from these practices will also be shown. The research will also reveal the unsatisfactory status of general consumer protection, the reasons for its failure and how the system cannot currently address current e-consumer problems. Moreover, available measures at both other national and international levels will be identified and the discussion will show how they can be adopted for Tanzanian initiatives. This study will contribute to the existing literature by shedding light on the source of consumer protection failure and by highlighting the approach that should be taken to address e-consumer protection in Tanzania. These initiatives have not previously been addressed in Tanzania, and hence will provide useful insight into, and a practical roadmap, for e-consumer protection in Tanzania.

## 1.5 ORIGINALITY OF THE RESEARCH

Models of e-commerce and issues arising from e-commerce and consumer protection have been discussed at both the international and national level. However, there are no discussions that have pinpointed an e-commerce model in third world countries, including Tanzania. This thesis elaborates on how a unique model of e-commerce exists in Tanzania. The characteristics surrounding this model and factors arising from such distinctive practices and consequences arising therein are discussed. Consequently, an existence of a new paradigm of e-trade is identified. The integration of e-commerce and m-commerce to form the model of e-trade has not previously been identified. This thesis identifies this unique e-trade practice, as well as the problems surrounding it and measures that can be taken to overcome these problems.

Furthermore, this thesis addresses the practice of C2C consumer transactions in Tanzania, elaborating on its specific features, the nature of the transactions and problems arising from it. The involvement of social media and networks in C2C e-transactions is also discussed. There is no other work that highlights this discussion for Tanzania.

The thesis identifies concerns of SMEs in Tanzania and suggests a protection be

afforded to SMEs when engaging in e-transactions. It is proposed that SMEs be identified as consumers to the extent of having certain rights in e-transactions, in particular with regard to unfair terms and conditions. This has not been done before for Tanzania.

This thesis is the only available academic work which identifies e-consumer practices in Tanzania and the unique problems they face. Moreover, it is the only available academic work that highlights the status of general consumer protection in Tanzania and identifies factors that contribute to the insufficient protection rendered to them.

The thesis further offers critical appraisal of the available e-commerce and e-consumer measures at both a national and international level; and elaborates on why the identified provisions will, or will not be, appropriate for the Tanzanian legal initiatives. The thesis goes further and proposes appropriate provisions to deal with specific e-consumer issues identified in the research. There is no other work that extensively addresses e-commerce and e-consumer measures, analysing specific provisions and modifying them to fit the Tanzanian context.

This thesis also highlights redress and dispute resolution issues, how Tanzania can deal with cross border e-transactions and consequently extend its e-consumer protection measures to e-consumers from other jurisdictions. No other thesis offers such a discussion and the available measures for Tanzania.

## 1.6 RESEARCH METHODOLOGY

The methodology of this study is based on doctrinal analysis where a study of the legal initiatives governing e-commerce, in particular e-consumer protection, is carried out. The measures are evaluated to see how they fit and can be adopted to regulate e-consumer concerns in Tanzania. The methodology further reflects reform oriented research<sup>11</sup> where the available measures for protecting e-consumers in Tanzania are

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<sup>11</sup> For further notes on reform oriented doctrinal analysis, please refer to Terry Hutchinson and Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17 *Deakin Law Review* 84, 101.

identified and a proposal for further measures is offered. This is, in effect, a limited use of comparative legal analysis.

The measures are categorised in three levels; global, regional and national. Evaluating the available measures at different levels of jurisdiction is necessary due to the nature of e-commerce and e-consumers. Hence, there are global characteristics and universal problems. However, it has been kept in mind how much a local context influences and shapes both e-commerce and the e-consumer. This is particularly the case in Tanzania and a key reason for evaluating available measures and how well they address concerns in the Tanzanian environment. This is also the reason why a comprehensive global research survey was not included in this thesis.

The discussion carried out a limited number of initiatives so as to avoid repetition especially where measures at a national and regional level had adopted similar measures from a global level. This is because global and regional provisions may be consulted as guidelines adopted for local initiatives.

This study includes a literature review which addresses the concerns raised and further interprets identified legal initiatives. Statutes, established and proposed laws, books, texts, reference materials, journal articles, newspapers articles, reports, archived or documented data, case laws, blog entries and other materials have been used to identify, analyse and evaluate available e-consumer measures and how they can be adopted to address concerns facing Tanzania e-consumers.

The outcome of the research methodology used is that it will contribute to identifying concerns that e-consumers both in Tanzania and other jurisdictions face when they engage in e-commerce; identifying the available measures taken in different jurisdictions addressing these concerns; elaborating how e-consumers in Tanzania remain unprotected due to a lack of specific e-consumer protection measures and insufficient available offline measures; showing how the available e-consumer protection measures from other jurisdictions do not address all concerns facing e-consumers in Tanzania due to different online characteristics and practises caused by the local context, and what is needed to address Tanzanian e-consumer concerns.

This research methodology will also reveal how new concerns arising out of e-commerce are yet to be addressed, such as the new practices and concerns arising out of C2C e-transactions and SMEs.

## 1.7 LITERATURE REVIEW

Global issues facing e-consumers in e-commerce have received the attention of numerous scholars. Research has been conducted and the outcomes have been compiled in reports, books and other media. In spite of these efforts, little has been done as far as protection of e-consumers in Tanzania is concerned. Until now there is no identified literature that highlights the unique features of e-commerce in Tanzania, its integration with m-commerce and how local culture and the socio-economic context shape a distinctive e-commerce model of Tanzania. Hence the problems that e-consumers in Tanzania face while engaging in e-commerce are yet to be addressed. Moreover, there is a lack of discourse on issues of insufficient measures on e-consumer protection, the reasons for such unsatisfactory measures, and possible solutions that will ensure a safeguard of e-consumer welfare in the country. Likewise, the topic of welfare and the status of SMEs protection when they transact in e-commerce in Tanzania has not been addressed.

However, there is available literature addressing information technology, e-commerce, electronic development of the law in Tanzania and general consumer protection. These will be discussed in this thesis. It is also acknowledged that there is massive literature in e-commerce and e-consumer protection from other jurisdictions. These are essential references, some of which will be used in this thesis. However, these works do not address local concerns facing Tanzanian e-consumers and do not reflect cultural, economic and social conditions of the country; for this reason, and also in the effort of limiting continuous repetitive discussion on the matter, the relevant literature available from other jurisdictions will not be discussed here. Only the available work from Tanzanian authors will be highlighted.

In order to have a structured discussion, this part will be carried through different headings themed according to the issues raised in this thesis. The local literature

identified, including those by Mambi,<sup>12</sup> Lukumay,<sup>13</sup> Mkwawa,<sup>14</sup> Mniwasa,<sup>15</sup> Ndumbaro,<sup>16</sup> Ally,<sup>17</sup> Kisyombe,<sup>18</sup> and Molony,<sup>19</sup> will be discussed under these headings.

### **1.7.1 Lack of legal framework to address the distinctive paradigm of e-commerce present in Tanzania**

This thesis has identified a distinctive paradigm of e-commerce in Tanzania caused by the integration between e-commerce and m-commerce. The existing consumer protection in the country is not only addressing e-consumers concerns but also does not recognise this new paradigm; hence the need for laws which reflect the socio, cultural, and economic context of Tanzania e-consumers is not addressed. This thesis has further noted that violations and concerns face Tanzanian e-consumers throughout several stages of e-transaction, such as in the formation stage, performance stage, payment stage and post-formation stage. These concerns include fraud, misleading actions, language concerns, insufficient information, unreasonable and high charges, mistakes and errors, spam, unfair terms and conditions, the role and liabilities of the intermediaries, limitation of rights, non-delivery and late delivery, partial sale or delivery interoperability, after-sale support, personal information handling, extra and high transaction costs, involvement of multi-intermediaries, insecure payment systems, insufficient assistance accessibility of dispute settlement systems, absence of laws for dispute settlement, legal infrastructures, ousting clauses, multi-jurisdiction

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<sup>12</sup> Adam J Mambi, *ICT Law Book: A Source Book for Information & Communication Technologies and Cyber Law* (Mkuki na Nyota, 2010).

<sup>13</sup> Zakayo Lukumay, *Electronic Banking and its Legal Basis in Tanzania* (Lambert Academic Publishing, 2012).

<sup>14</sup> Haji J Mkwawa, *A Prognosis of the Challenges Facing the Tanzania Revenue Authority on the Taxation of Electronic Commerce* (LLM Dissertation, University of Dar es salaam, 2006).

<sup>15</sup> Mary S Mniwasa, *The Origin, Operation and Regulation of Electronic Banking In Tanzania: Law and Practice* (LLM Dissertation, University of Dar es salaam, 2005).

<sup>16</sup> Damas D Ndumbaro, *A Critical Assessment of the Law Related to Consumer and Consumer Protection in Tanzania: A Particular Emphasis on Food Law and Protection of Infants* (LLM Dissertation, University of Dar es salaam, 2003).

<sup>17</sup> Abdallah Ally, 'The Prospects and Legal Challenges Posed by M-Payments and M-Banking Services in Tanzania' (2014) 5 *Open University Law Journal* 49.

<sup>18</sup> Martha Kisyombe, 'Emerging Issues in Consumer Protection: Complementarities and Areas of Tension' (Paper presented at The Interface Between Competition and Consumer Policies, UNCTAD Ad-Hoc Expert Group Meeting, Geneva, 12 - 13 July 2012).

<sup>19</sup> Thomas Molony, 'Carving a Niche: ICT, Social Capital, and Trust in the Shift from Personal to Impersonal Trading in Tanzania' (2009) 15 *Information Technology for Development* 283.

transactions and enforceability.

Problems arising from C2C transactions have also been noted in the thesis including those arising in online auctions such as the anonymous nature of online auctions, integration of B2C and C2C in C2C transactions, shill bidding, cancellation and retraction of bids, automatic bidding and multiple functioning features of online auctions, and problems arising from online social networks transactions such as a lack of regulation, business involvement and the changing roles of key players. As noted at the beginning of this discussion, some of these problems are faced by e-consumers all over the world, however, the social, cultural and economic context they occur in within Tanzania makes it necessary to address them specifically to reflect this unique context.

In his work, the *ICT Law Source Book*, Adam Mambi<sup>20</sup> recognises the lack of updated laws addressing information technology in general. He contends that information communication technology (ICT) in Tanzania brings challenges to several areas of contract law, intellectual property law, company law, labour law and banking law, amongst others.<sup>21</sup> However, these challenges have not been addressed. Overall, he contends that current laws do not recognise cyberspace developments.<sup>22</sup> Mambi goes further and specifies several areas of law which need to be addressed including laws such as those governing contract,<sup>23</sup> communication and broadcasting,<sup>24</sup> gaming and gambling,<sup>25</sup> property law,<sup>26</sup> and company law<sup>27</sup> that have been affected by e-commerce.

Mambi further discusses consumer protection where he points out that Tanzania lacks laws to protect consumers who engage in e-commerce<sup>28</sup> and that the available consumer protection laws only protects consumers in offline transactions.<sup>29</sup> He further

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<sup>20</sup> Mambi, above n 8.

<sup>21</sup> Ibid.

<sup>22</sup> Ibid.

<sup>23</sup> Ibid 13.

<sup>24</sup> Ibid 51-3.

<sup>25</sup> Ibid 63.

<sup>26</sup> Ibid 81.

<sup>27</sup> Ibid 91.

<sup>28</sup> Ibid 134.

<sup>29</sup> Ibid 137.

mentions initiatives taken by the *UNCITRAL Model Law on Electronic Commerce*, the Organisation for Economic Co-operation and Development (OECD), the United Kingdom (UK), the United States of America (US), Australia and South Africa among others, suggesting Tanzania could learn from the work done by these organisations and jurisdictions.<sup>30</sup> Whilst there is no doubt that Mambi has highlighted the effects of e-commerce to consumers in Tanzania and the lack of legal framework thereto, there are still extensive gaps in that address. Foremost, Mambi's work in this area is brief and does not address all e-consumer concerns raised in this thesis, especially the address on the distinctive paradigm of e-commerce in Tanzania, the integration of e-commerce and m-commerce and the need for the legal framework to reflect the cultural context.

Similarly, Lukumay discusses the lack of regulatory framework in the area of information technology in Tanzania. Lukumay's work focuses on issues surrounding electronic banking in Tanzania.<sup>31</sup> He acknowledges that the law governing banking in Tanzania does not address concerns arising out of electronic banking (e-banking) technology and as a result consumers engaging in e-banking are faced with several other concerns including financial loss due to fraud and theft,<sup>32</sup> inability to access funds due to technical errors,<sup>33</sup> unauthorised e-transactions,<sup>34</sup> issues in relation to banker-customer in e-banking,<sup>35</sup> a lack of various payment rights,<sup>36</sup> breach of confidentiality<sup>37</sup> and privacy,<sup>38</sup> and a lack of dispute mechanisms for e-banking customers.<sup>39</sup> Lukumay offers further suggestions on what steps can be taken to address these concerns.

Lukumay's work is relevant to this thesis as he extensively address issues relating to e-banking in the country. Some of the concerns raised in the thesis such as a lack of laws regulating electronic payments (e-payments) are highlighted. However,

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<sup>30</sup> Ibid 136-42.

<sup>31</sup> Lukumay, above n 9.

<sup>32</sup> Ibid 15.

<sup>33</sup> Ibid 102, 104.

<sup>34</sup> Ibid 80.

<sup>35</sup> Ibid 98.

<sup>36</sup> Ibid 105.

<sup>37</sup> Ibid 106.

<sup>38</sup> Ibid 109.

<sup>39</sup> Ibid 113-8.



Lukumay's work falls short of the core of this thesis as it is limited to the banking industry and its consumer concerns. This is different from this thesis where payment concerns of e-consumers are raised, most of them being unbanked consumers. These include the use of payment intermediaries and mobile phone payments in consumers' online transactions. Needless to say, Lukumay's work does not address other e-consumer concerns raised in this thesis, moreover, the distinctive paradigm of e-commerce present in Tanzania is not recognised.

Similar to the work of the two scholars above, Kisyombe,<sup>40</sup> Molony,<sup>41</sup> Mkwawa,<sup>42</sup> Mniwasa<sup>43</sup> and Ndumbaro<sup>44</sup> confirm the fact that Tanzania lacks the legal framework addressing information technology in general and e-commerce in particular.

Mkwawa, who discusses taxation of e-commerce in Tanzania, further establishes that there are no laws regulating e-commerce, particularly in the area of taxation.<sup>45</sup> Mkwawa's discussion focuses on taxation law principles in general and lacks an analytical discussion of the type and features of e-commerce in the country and e-consumer concerns. Consequently, issues pointed out in this thesis are not addressed.

Similarly, Mniwasa's work points out a lack of a legal framework addressing e-transactions.<sup>46</sup> Mniwasa focuses on the origin, operation and regulation of e-banking in the country.<sup>47</sup> Mniwasa asserts that e-banking in Tanzania carries high risks and minimal regulation.<sup>48</sup> According to Mniwasa, parties to these transactions are governed generally by contracts, and in practice, the applicable rules are dictated by the financial institutions which operate the electronic systems.<sup>49</sup> She points out some issues consumers face in e-banking, including a lack of security, regular equipment failure, and the lack of facilities such as charge back services, heavy liabilities to consumers in the case of fraud, loss or theft, a lack of confidentiality and a denial of

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<sup>40</sup> Kisyombe, above n 14.

<sup>41</sup> Molony, above n 15.

<sup>42</sup> Mkwawa, above n 10.

<sup>43</sup> Mniwasa, above n 11.

<sup>44</sup> Ndumbaro, above n 12.

<sup>45</sup> Mkwawa, above n 10, 33-5.

<sup>46</sup> Mniwasa, above n 11, 87.

<sup>47</sup> Mniwasa, above n 11.

<sup>48</sup> Ibid 5-7.

<sup>49</sup> Ibid 87.

responsibility on behalf of the banks.<sup>50</sup>

This study is relevant as it establishes some of the issues which e-consumers face when dealing with e-payments. However, this study is limited as it only establishes general problems surrounding e-payment facilities in Tanzania and the problems consumers face, with the main focus on e-banking. The study lacks discussion on other aspects of e-consumer payments such as those done through mobile phones and money wired transfers. Moreover, the study does not address other issues raised in this thesis; e-commerce and e-consumer protection issues are not addressed.

Similar to the views expressed by Mniwasa, Ally examines the prospects and legal challenges posed by mobile payments (m-payments) and mobile banking (m-banking) services in Tanzania.<sup>51</sup> He acknowledges the lack of legal infrastructure governing e-payments in the country.<sup>52</sup> The major difference noted in this work is the discussion on m-banking. Ally acknowledges the use of mobile phone money transfer in the country and concerns arising out of such practices.<sup>53</sup> However, this focuses on general consumer protection and fails to identify particular concerns e-consumers face when using mobile phone payments or even any other form of e-payments. Consequently, Ally's work serves as a good elaboration of what is occurring in Tanzania mobile phone payments and e-payments in general but does not address any concerns which have been raised in this thesis.

Another relevant work is that of Kisyombe,<sup>54</sup> discussing competition and consumer protection policy in Tanzania. Kisyombe has highlighted issues mentioned in this thesis regarding the general consumer protection in the country.<sup>55</sup> She also mentions emerging issues in the consumer protection arena,<sup>56</sup> some challenges<sup>57</sup> and proposes a review of general consumer protection.<sup>58</sup> This work briefly elaborates the general consumer protection system in the country with focus on its structure and

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<sup>50</sup> Ibid 107-15.

<sup>51</sup> Ally, above n 13.

<sup>52</sup> Ibid 49-52.

<sup>53</sup> Ibid 53-5.

<sup>54</sup> Kisyombe, above n 14.

<sup>55</sup> Ibid 3-7.

<sup>56</sup> Ibid 9.

<sup>57</sup> Ibid 14.

<sup>58</sup> Ibid 15.

responsibilities. Whereas it is a good reference in pointing out the general consumer protection system in the country, and establishing the fact that it is not catching up with the emerging consumer issues; it does not bring much contribution in the area of e-commerce and e-consumer protection.

Looking at consumer protection and other related laws in Tanzania with a particular emphasis on food law and the protection of infants, Ndumbaro<sup>59</sup> argues that consumer protection in Tanzania is unsatisfactory in that consumers are not fully protected by the existing laws. He determines there are no specific laws for consumer protection and instead, consumer legal protection depends on collections of various pieces of legislation some of which are outdated and lack coordination.<sup>60</sup> Ndumbaro's argument is based on existing Tanzanian consumer protection laws, their practicability and effectiveness, representation of consumers in seeking their rights, and consumer awareness of the law and their rights.<sup>61</sup>

According to Ndumbaro, Tanzania's regulatory agencies responsible for the administration of consumer protection law are not capable of properly discharging their functions due to a lack of coordination, lack of expertise, lack of government commitment and budgetary constraints.<sup>62</sup> Ndumbaro establishes that the legal redress available for consumers is expensive, slow and ineffective.<sup>63</sup> Furthermore, other available laws such as contract law, criminal law and the law of tort are inadequate in protecting consumers.<sup>64</sup> He also establishes that consumer protection through private associations is not effective, as at the time he conducted this research there were almost no private consumer protection associations, and the only registered consumer protection association was not operating and had not conducted any official duties for the past eight years.<sup>65</sup> Ndumbaro's work is yet further evidence of what has been alleged in this study regarding the status of consumer protection in the country. It provides a valid ground for this study. However, the work is far from addressing any issues raised in this thesis. Ndumbaro's work focuses on food laws and infant

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<sup>59</sup> Ndumbaro, above n 12.

<sup>60</sup> Ibid 157.

<sup>61</sup> Ibid.

<sup>62</sup> Ibid 158.

<sup>63</sup> Ibid 159.

<sup>64</sup> Ibid 157-8.

<sup>65</sup> Ibid 29.

protection, and does not address issues regarding e-commerce and e-consumer protection. Therefore, all the matters raised in this thesis have not been covered in the study.

There is still a need to conduct an extensive examination of problems in Tanzania and how available measures can be adopted to address these problems. It is imperative that a critical and analytical discussion of existing problems, gaps in the laws and how available initiatives may be incorporated for Tanzanian e-consumers, be conducted in order to fill the existing gaps.

### ***1.7.2 Lack of recognition of the major role players in the field of e-commerce***

The advance in e-commerce has brought lots of changes in the playing field. Among these changes are the new practices and roles of key players in the field of e-commerce. This includes new practices and the position of C2C e-consumers and SMEs, and the new transactional arenas of commerce such as social media and social networks.

In his work, Mambi recognises the effects of e-commerce and the lack of protection thereto, however, he falls short of recognising the major role players in the field of e-commerce as pointed out in this thesis. Consequently, the position and protection of SMEs and the position of C2C e-consumers especially in social media and social networks have not been addressed.

In the work of Lukumay, the focus is mainly in e-banking, and he highlights the legal position of e-banking consumers. However, the author does not focus on how e-transactions have affected major role players especially in the payment transactions; and in particular how SMEs and consumers in C2C e-transactions are affected.

Similar situation is noted in the rest of literature identified above where authors have not addressed lack of recognition of the major role players in the field of e-commerce.

### **1.7.3 The concerns of adopting international measures for Tanzania initiatives**

Due to the complex nature of e-commerce in Tanzania mostly influenced by cultural and social practices of the society, adoption of international measures addressing e-consumer concerns need to be done with caution. Initiatives adopted need to reflect the local context so as not to cause further uncertainties.

Mambi's work discussed initiatives from other jurisdictions,<sup>66</sup> such as those from the UN (*UNCITRAL Model Law on Electronic Commerce*), UK and South Africa, and highlights their adoption to the Tanzanian context. Mambi is of the view that available measures such as model laws can be useful in seeking solutions to Tanzania e-commerce problems.<sup>67</sup> However, the discussion does not raise any concerns of adopting measures it has identified for Tanzania initiatives and issues raised in this thesis regarding the subject are not addressed.

In his work, Lukumay discusses other jurisdictions' legal responses to issues on electronic banking<sup>68</sup> where initiatives such as those from the UK,<sup>69</sup> Australia,<sup>70</sup> the US,<sup>71</sup> Singapore,<sup>72</sup> Malaysia,<sup>73</sup> Canada,<sup>74</sup> India<sup>75</sup> and South Africa<sup>76</sup> are pointed out. However, he falls short of analysing the adoption of these laws to Tanzania context and what will work for the Tanzania situation. Similar to Mambi, this work does not discuss the complex nature of Tanzania practices, its cultural and social context and the concerns which will arise when adopting measures from other jurisdictions. This thesis addresses such concerns.

In his work, Mniwasa points out the need to adopt international measures to address Tanzania concerns. He sums this up where he states:

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<sup>66</sup> Mambi, above n 8, 134-43.

<sup>67</sup> Ibid 18.

<sup>68</sup> Lukumay, above n 9, 122-89.

<sup>69</sup> Ibid 129.

<sup>70</sup> Ibid 130.

<sup>71</sup> Ibid 134.

<sup>72</sup> Ibid 159.

<sup>73</sup> Ibid 162.

<sup>74</sup> Ibid.

<sup>75</sup> Ibid 172.

<sup>76</sup> Ibid 176.

In enacting the law on e-commerce Tanzania must look into various international model laws such as the United Nations Commission on International Trade Law (UNCITRAL) or the US model...<sup>77</sup>

It is evident that Mniwasa's views on the issue are general and do not address issues raised in this thesis regarding the adoption of international measures addressing e-consumer concerns for Tanzania.

#### **1.7.4 Lack of sufficient measures for e-consumer dispute resolutions**

It has been identified in the thesis that e-consumers in Tanzania lack sufficient means to address both local and cross border e-transaction disputes.

In his work, Mambi briefly discusses consumer dispute resolutions where he focuses on the issues of jurisdiction. He does this by pointing out the legal position in Tanzania and the measures available at an international level and within other jurisdictions, such as those from the EU and OECD.<sup>78</sup> He also points out the legal position on dispute resolution both in Tanzania and within other jurisdictions.<sup>79</sup> This is done through elaborating what the laws provide in these jurisdictions and what is available for parties in dispute. It is noted that Mambi's address on dispute resolution concerns is too general and does not raise specific issues as has been done in this work. Mambi falls short of pointing out the concerns that e-consumers face in Tanzania and possible solutions to these concerns.

Lukumay addresses the issue of dispute resolution by identifying the problem in Tanzania. He expresses that as Tanzania has no legal framework that protects consumers engaging in e-banking transactions and e-payment systems,<sup>80</sup> it lacks efficient mechanisms for resolving disputes in such transactions.<sup>81</sup> He also discusses

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<sup>77</sup> Mniwasa, above n 11, 145.

<sup>78</sup> Mambi, above n 8, 141, 143-4.

<sup>79</sup> Ibid 155-71.

<sup>80</sup> Lukumay, above n 9, 275-7.

<sup>81</sup> Ibid 278.

how the US through the *Electronic Fund Transfer Act* (EFTA) 1978 has addressed dispute resolution for consumer protection in the electronic fund transfers system.<sup>82</sup> The author's discussion is limited in describing the problem in e-banking and how the US has responded in resolving disputes arising in electronic fund transfers. The author argues for measures similar to the available legal framework in developed countries to be taken in Tanzania, however, he does so in a general note and no specific dispute resolution measures are discussed.<sup>83</sup> The key discussion and issues on dispute resolution raised under this thesis are not addressed.

The abovementioned works present a specific focus on Tanzania bringing affirmation to issues raised in this study, such as the presence of e-commerce in Tanzania, a lack of satisfactory consumer protection in general, and a lack of laws addressing electronic and online transactions. They do not address the issues raised in this thesis, however, they will assist in confirming further assertions made by this study regarding e-consumer protection in Tanzania.

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<sup>82</sup> Ibid 185.

<sup>83</sup> Ibid 278.

## CHAPTER TWO

*The march of technology ... has increased the difficulties of the consumer along with his opportunities; and it has outmoded many of the old laws and regulations and made new legislation necessary.*

*John F Kennedy*<sup>1</sup>

### 2. CONSUMER PROTECTION IN THE NEW ERA

#### 2.1 INTRODUCTION AND CONTEXT TO THE PROBLEM

##### 2.1.1 Introduction

Recent years have seen considerable technological developments resulting in the advanced growth of electronic commerce (e-commerce). Of particular note has been the growth in business to consumers (B2C) and consumers to consumers (C2C) online transactions.

The development of e-commerce is at a stage where it cannot be avoided in modern business. E-commerce has impacted on both business and the customer (consumer). It improves efficiency by enlarging the scope of the market and lowering operating costs and barriers for businesses.<sup>2</sup> It also offers convenience shopping, reduced costs, facilitation of price comparison and a wider selection of goods to consumers (see Figure 2.1).<sup>3</sup>

Furthermore, e-commerce benefits people all over the world as reaches beyond the traditional barriers of distance, and enables businesses and consumers across borders to connect. More notably so among consumers and businesses in developing countries

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<sup>1</sup> John F Kennedy, *Special Message to the Congress on Protecting the Consumer Interest* (15 March 1962) <<http://www.presidency.ucsb.edu/ws/?pid=9108>>.

<sup>2</sup> OECD, 'Electronic and Mobile Commerce' (2013) 228 *OECD Digital Economy Papers* <<http://dx.doi.org/10.1787/5k437p2gxw6g-en>>.

<sup>3</sup> Ibid.



as it widens the capacity of reaching the producing and supplying countries, and hence provides opportunities for a wider range of goods and services.<sup>4</sup>

E-commerce is said to facilitate easy and cross border trade:

Producers and traders no longer need to maintain physical establishments requiring large capital outlays. Virtual shops and contact points on the Internet may enable storage close to the production site and distribution can be made directly to the consumer. Increased advertising possibilities worldwide may help small and medium industries and businesses in developing countries that traditionally find it difficult to reach the customer abroad. It may also enable such firms to eliminate middlemen while trying to sell their products abroad.<sup>5</sup>

This development has changed the commercial playing field in developing countries like Tanzania, where not only small businesses can transact directly from suppliers or manufactures across borders, but even individual consumers can do so. The easy availability of information through online advertisements, cross border money transfers and other e-commerce facilitators have changed the way commerce has been traditionally conducted.

The development in e-commerce has further affected various aspects of the social, commercial and political life of those engaged in it. Among them is the legal aspect of every jurisdiction that has been involved in e-commerce, notably the area of law concerning consumer protection. E-commerce not only raises opportunities for consumers and businesses but also new risks and challenges not previously addressed by the traditional regime of consumer protection. Moreover, the available traditional measures are not sufficient to address these problems arising in e-commerce and electronic transaction (e-transaction) as the online environment is a different environment from the offline one with new features and characteristics.

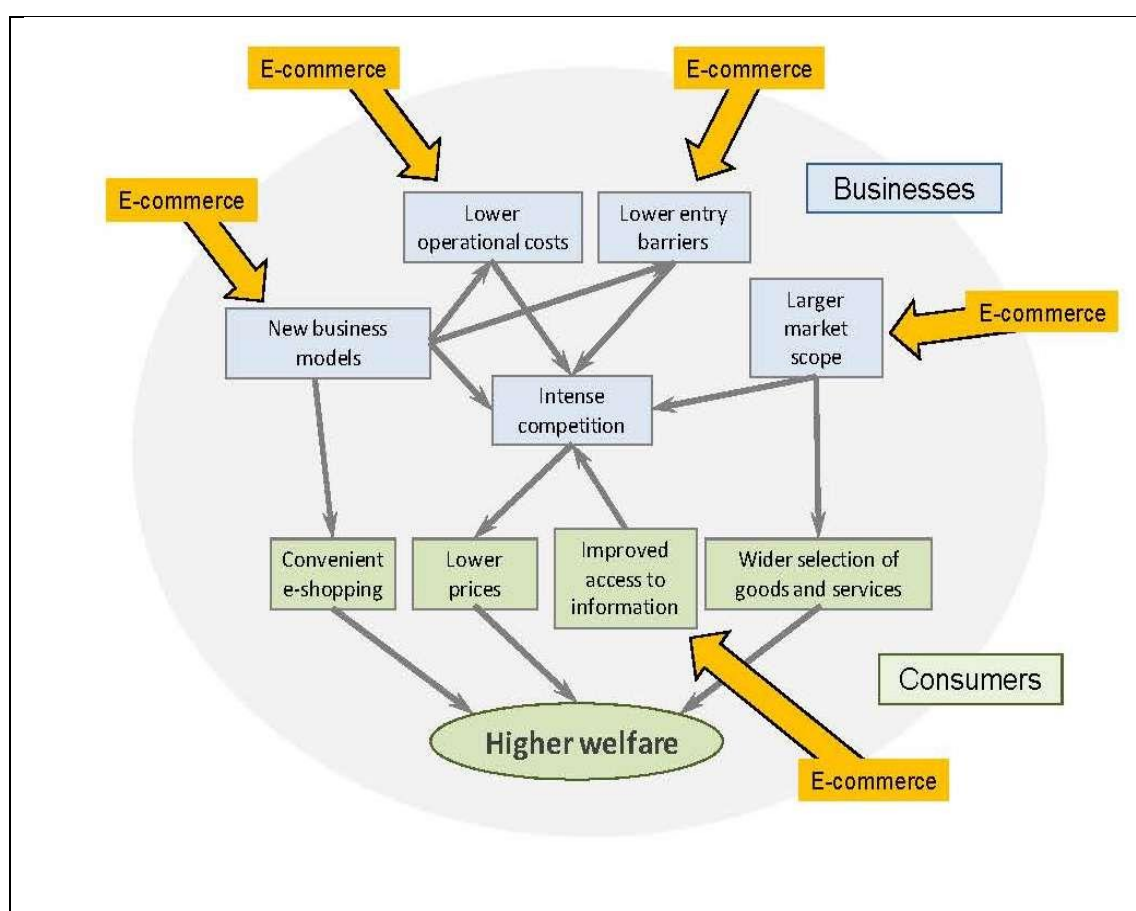
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<sup>4</sup> Muhammad Aslam Hayat, 'E-Commerce Legal Framework: Pakistan's Experience' (Paper presented at Joint UNCTAD - UNESCAP Asia-Pacific Regional Conference on E-Commerce Strategies for Development, Bangkok, 20-22 November 2002)

<[http://r0.unctad.org/ecommerce/event\\_docs/bangkok/hayat.pdf](http://r0.unctad.org/ecommerce/event_docs/bangkok/hayat.pdf)>.

<sup>5</sup> Ibid.

**Figure 2.1 The Impact of E-commerce**



Source: OECD, 2013<sup>6</sup>

Consequently, consumer welfare is compromised through little or no protection against violation of their rights.

There are several issues facing e-consumers when they transact online involving various aspects such as the nature of transactions (such as e-commerce or mobile commerce), the transaction parties (such as B2C and C2C) and the problems that arise from the transactions (such as fraud, language misunderstandings, spam, and lack of information). Tanzanian e-consumers have concerns in all these areas.

The problems in Tanzania reveal themselves in a distinctive way. This is because e-commerce in Tanzania is unique. It is integrated with mobile commerce (m-commerce) and the two are inseparable. Consequently, a unique way of electronic market (e-

<sup>6</sup> 'Electronic and Mobile Commerce' (2013) 228 *OECD Digital Economy Papers* <<http://dx.doi.org/10.1787/5k437p2gxw6g-en>>.

market) is formed, together with problems distinct to Tanzania.

Moreover, e-commerce in Tanzania is influenced by the socio-economic, cultural and political practices of the country. Consequently, Tanzania e-consumers are faced with specific problems that are a result of the particular features that e-commerce has presented itself among the community. These problems are unique to Tanzania e-consumers and have not been addressed anywhere else.

Tanzania's history of consumer protection stems from socialism, 'Ujamaa'<sup>7</sup> and 'Undugu/Ubuntu'<sup>8</sup> ideologies. These ideologies are reflected in everyday life and influence the way consumers trade. They also shaped the consumer protection regime and the current consumer protection status in the country. A change of economic aspect of these ideologies in 1986 is one of the contributing factors leading to poor consumer protection status in the country. Consumer protection is piecemeal with different bodies dealing with different issues of consumer protection resulting in ineffectiveness in the protection regime. The insufficient protection of general consumers in the country places e-consumers in a weak and vulnerable position.

There are no specific laws which address e-commerce and e-consumer protection and the available traditional initiatives are insufficient. Moreover, there are insufficient and irrelevant methods of enforcement when dealing with e-commerce and e-consumer concerns.

Most countries engaging in e-commerce need to undertake major legislative reforms and incorporate principles and rules provided by the international bodies and guidelines, such as the *UNCITRAL Model Law on Electronic Commerce*, *UNCITRAL*

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<sup>7</sup> Ujamaa is a Swahili word for brotherhood, it reflects African socialism beliefs, see Mzukisi Yona, *Popular Histories of Independence and Ujamaa in Tanzania* (MA Thesis, University of the Western Cape, 2008) 6.

<sup>8</sup> Undugu and Ubuntu are African (and Tanzanian) philosophy in humanities, with a belief that person is a person through other persons. See D S Sigger, B M Polak and B J W Pennink, ' 'UBUNTU' or 'HUMANNESS' as a Management Concept Based on Empirical Results from Tanzania' (CDS Research Report No 29, University of Groningen, July 2010) 2-3  
<<http://www.rug.nl/research/globalisation-studies-groningen/publications/researchreports/reports/ubuntuorhumanness.pdf>>.

*Model Law on Electronic Signatures*,<sup>9</sup> the *United Nations Guidelines for Consumer Protection*<sup>10</sup> and *OECD Guidelines for Consumer Protection in the Context of Electronic Commerce 1999* just to mention a few.<sup>11</sup> However, there is little incorporation of such international efforts under the Tanzania jurisdiction in order to safeguard and further e-consumer welfare. Moreover, there is a need to assess how much protection these guidelines will provide to situations such as the one in Tanzania. The guidelines and other available international initiatives are still important and need to be considered when addressing concerning issues in Tanzania; however, there is a need to do so while keeping the local context in mind.

This study will examine concerns for Tanzanian e-consumers and suggests measures to be taken. Efforts from other jurisdictions in the world will be highlighted and recommended while keeping the Tanzanian context in mind.

### **2.1.2 The jungle and the matrix world of Tanzania<sup>12</sup>**

The United Republic of Tanzania is located in Eastern Africa between longitude 29° and 41° east, latitude 1° and 12° south. It was formed out of a union of two sovereign states, namely, Tanganyika and Zanzibar on 26th April 1964. Zanzibar is an autonomous part of the United Republic, and is made up of two islands, namely, Unguja and Pemba. Tanzania was under British administration United Nations Trusteeship until it gained independence on 9 December 1961, while Zanzibar was

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<sup>9</sup> GA Res 51/162, 51<sup>st</sup> sess, Agenda Item 148, UN Doc A/RES/51/162 (30 January 1997, adopted 12 June 1996); GA Res 56/80, 56<sup>th</sup> sess, Agenda Item 161, UN Doc A/RES/56/80 (24 January 2002, adopted 5 July 2001).

<sup>10</sup> GA Res 1984/63 of 26 July 1984, UN Doc A/RES/39/248 (adopted 16 April 1985).

<sup>11</sup> UNCITRAL and OECD model laws and guidelines are the principal e-commerce guidelines encouraging and guiding e-commerce law reforms and enhancing consumer protection. See Hayat, above n 4.

<sup>12</sup> In his article 'From the Jungle to the Matrix: The Future of Consumer Protection in Light of its Past', Norman Silber gives a chronological and historical order of events and roots of the consumer protection initiatives; relating the events from early and mid-20th century's consumer protection situation (with examples drawn from the novel *The Jungle* - an iconic muckraking consumer novel) to providing an overview of the current situation of consumer protection in the internet era (drawing examples from *The Matrix* - a movie described by Silber as a philosophic cinematic critique of consumer protection). Similar to Silber's article, this section is going to reflect the historical development of consumer protection in Tanzania and briefly highlight the current consumer protection status in the country. For further reference on the article see Norman Silber, 'From the Jungle to the Matrix: The Future of Consumer Protection in Light of its Past' in Jane K Winn (ed), *Consumer Protection in the Age of the 'Information Economy'* (Ashgate Publishing, 2006) 15.

ruled by an Arab Sultanate, and was recognised as a British protectorate until 9 December 1962. The government of the United Republic of Tanzania is recognised as a unitary republic; consisting of the Union government and the Zanzibar Revolutionary government.<sup>13</sup>

Tanzania is the largest country among the East African countries (ie Kenya, Uganda and Tanzania). Dodoma is the capital and Dar es Salaam is the commercial capital and major sea port for the Tanzanian mainland. The port also caters for the neighbouring land-locked countries of Rwanda, Burundi, Uganda, Zambia, Malawi and the Democratic Republic of Congo. The other seaports in Tanzania include Zanzibar, Tanga and Mtwara.<sup>14</sup>

Tanzania's legal system is based on the English Common Law system. It derived this system from its British colonial legacy, and the system of government, which is based to a large degree on the Westminster parliamentary model.

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<sup>13</sup> Permanent Mission of the United Republic of Tanzania to the United Nations in New York, *About the United Republic of Tanzania* (2013) <<http://tanzania-un.org/index.asp?pgid=56>>.

<sup>14</sup> Ibid; Australian Government, Department of Foreign Affairs and Trade, *Tanzania* (n.d.) <<http://www.dfat.gov.au/geo/tanzania/>>.

Figure 2.2 Map of Tanzania



Source: Maps of World<sup>15</sup>

Tanzanian law derives from the Constitution, which provides for a bill of rights and other fundamental rights, duties and obligations to Tanzania citizens. There are also statutes, which comprise several Acts enacted before, and after, independence. Another source of law in Tanzania is case law where cases from the High Court and Court of Appeal are considered a binding authority. There are also received laws

<sup>15</sup> Maps of World, *Political Map of Tanzania* (22 February 2012)  
<<http://www.mapsofworld.com/tanzania/tanzania-political-map.html>>.

established under *the Judicature and Application of Laws Act* [CAP 358 R.E. 2002] by virtue of section 2.3 where Common Law, Doctrine of Equity, and Statutes of General Application of England, applicable before 22 of July 1920<sup>16</sup> are recognised in the country. Another source of law is customary law, where customs of the parties are taken into consideration as long as it does not conflict with the statutory law. There is also recognition of Islamic law applicable among Muslim parties in family matters such as succession and inheritance. Another source is international law, where treaties, conventions and other international agreements are adopted.

The judiciary in Tanzania includes the Court of Appeal of the United Republic of Tanzania, the High Courts for mainland Tanzania, the Magistrates Courts, and the Primary Courts. There are also other courts such as the Court Martial and Court Martial Appeal Court which apply only to the military in the country; and Juvenile Courts for children and young persons.

There are also tribunals including the District Land and Housing Tribunal, Tax Tribunal and the Tax Appeals Tribunal, Labour Reconciliation Board, the Tanzania Industrial Court and Fair Competition Tribunal.

The consumer protection regime has been influenced by the political and economic development of the country. Tanzania has passed through various political phases, which have largely influenced its economic phases. As a result, each of these political and economic phases have shaped the development and establishment of the consumer protection system. The political influence on the consumer regime goes way back during colonialism stage in the country; however, the discussion here focuses on political and economic influences after independence in 1961.

The first economic stage, known as the ‘post-independence’ or ‘post-colonial free market economy’, took place from 1961 to 1967; soon after Tanzania gained independence. Tanzania was just starting to build its economy and politically it still had ties with colonial powers. This also influenced the economic condition of the

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<sup>16</sup> This date is considered the reception date for English Law in Tanzania.

country where much was reflecting the colonial era.<sup>17</sup>

It is argued that at this time the British still had much influence in the country;<sup>18</sup> the economic focus remained to be the production of unprocessed and semi-processed agricultural commodities and other raw materials. Colonial laws and procedures were also still in use and business conduct still favoured the colonial master.<sup>19</sup>

Several years after independence there was a need for change of the political order in the country.<sup>20</sup> Tanzania embarked on a path of socialist principles and became a socialist state. This also influenced the economic order in the country and defines a second economic era recognised as the 'centrally planned economy' from 1967 - 1985.

All major sources of economy were controlled by the state. A significant point during this era was the establishment of the Arusha Declaration.<sup>21</sup> This was a political statement on socialism and self-reliance. It also established several principles in the country such as 'Ujamaa'.<sup>22</sup> It was proclaimed in the declaration that 'in order to ensure economic justice, the state must intervene actively in the economic life of the nation so as to ensure the wellbeing of all citizens and so as to prevent the exploitation of one person by another...'<sup>23</sup>

During this era, the state came to control everything, and was the sole provider of goods and services,<sup>24</sup> including overseeing consumer affairs. This era lasted until the mid-1980s when the country was faced with an economic crisis and had to undergo economic reforms. The major change that occurred due to the crisis was to liberalise

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<sup>17</sup> Howard Stein, 'Theories of the State in Tanzania: A Critical Assessment' (1985) 23 *The Journal of Modern African Studies* 105, 114.

<sup>18</sup> Honest Prosper Ngowi, 'Economic Development and Change in Tanzania Since Independence: The Political Leadership Factor' (2009) 3 *African Journal of Political Science and International Relations*, 259 <<http://www.academicjournals.org/AJPSIR>>.

<sup>19</sup> Ibid.

<sup>20</sup> Stein, above n 17, 113.

<sup>21</sup> The Arusha Declaration is a political statement of African Socialism, 'Ujamaa', or brotherhood. See Julius Nyerere, 'The Arusha Declaration', 5 February 1967 <<https://www.marxists.org/subject/africa/nyerere/1967/arusha-declaration.htm>>.

<sup>22</sup> Ujamaa, above n 7.

<sup>23</sup> Ibid.

<sup>24</sup> Godius Kahyarara, 'Competition Policy, Manufacturing Exports, Investment and Productivity: Firm-Level Evidence from Tanzania Manufacturing Enterprises' in UNCTAD, *Competition, Competitiveness and Development: Lessons From Developing Countries* (United Nations, 2004) IV.2, 268 <[http://unctad.org/en/Docs/ditcclp20041ch4\\_en.pdf](http://unctad.org/en/Docs/ditcclp20041ch4_en.pdf)>.



the country's economy.

This marked another era of free market reform in Tanzania starting from 1986. This era was also influenced by political changes due to the fall of socialism and the introduction of the multi-party system in Tanzania. Economically, there was privatisation of government corporations and the introduction of private business sectors. The early stages of this era were characterised by the establishment of private businesses and little consumer protection. The previous government institutions responsible for controlling trade were deregulated and no other measures were put in place. Consumers had no protection. The market continued to be unregulated until 1994 when the government enacted the *Fair Trade Practices Act*.<sup>25</sup> This Act had many imperfections and did not effectively safeguard the welfare of the consumer. This resulted in the Act being replaced with the *Fair Competition Act, 2003* (Cap 285 R.E. 2002). However, this study demonstrates<sup>26</sup> that the *Fair Competition Act* fails to sufficiently safeguard the welfare of Tanzanian consumers and there is a need for readdressing consumer protection measures.

The Tanzania consumer protection regime has been through a long journey of discovery and learning. It is also evident that there is still a lot to be done to reach satisfactory results. The current consumer protection offered in the country has a lot of flaws and needs to be revamped. This system, which has failed to fulfil its purpose, cannot satisfactorily and successfully address e-consumer protection issues. The discussion in this study reveals why current measures are not the answer and will highlight measures to be taken in order to successfully address e-consumer protection in Tanzania.

### **2.1.3 As the dawn darkens<sup>27</sup>**

Measures have been taken by the Tanzania government to enhance the economy and

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<sup>25</sup> *Fair Trade Practices Act, 1994* (Tanzania).

<sup>26</sup> See Chapter Three and Five.

<sup>27</sup> Please note, the use of figure of speech figure (oxymoron/paradox) in the phrase 'as the dawn darkens' signifying the lack of hope even where new efforts are put in place. This is meant to reflect consumer situation in Tanzania where even though there are new efforts which should bring hope (awakening/dawn), these efforts are flawed from the beginning (darkness) and fail to bring that hope.

welfare of its citizenships. These have taken different forms such as economic plans and regional integration. Their purpose was to shed light on the problems facing the country and its people and provide for a brighter future. However, these efforts have been flawed through a failure to address key issues, a lack of commitment, and diverse political interests amongst other problems. The discussion will highlight two important initiatives taken by the Tanzanian government, namely, ‘Tanzania’s National Vision 2025’ and the ‘East African integration’. These initiatives are important in the development of consumer protection in general and protection of e-consumers in particular, however, these efforts are lacking in offering adequate protection.

#### **(a) Tanzania’s National Vision 2025**

It is essential to mention here ‘Tanzania’s National Vision 2025’ (Vision 2025).<sup>28</sup> This is the government’s development vision for Tanzania, aimed at guiding economic and social development efforts till 2025.<sup>29</sup>

Vision 2025 outlines five main attributes that the country is expected to attain by 2025. These attributes are: a high quality livelihood; peace, stability and national unity; good governance; a well-educated and learning society imbued with an ambition to develop; and a competitive economy capable of producing sustainable growth and shared benefits.<sup>30</sup> Moreover, Vision 2025 contains three principal objectives which are: achieving a quality and good life for all; good governance and the rule of law; and building a strong and resilient economy that can effectively withstand global competition.<sup>31</sup>

Vision 2025 also identifies basic pillars for its successful implementation, including the need for ‘competence and competitiveness’ which can be realised through sound macroeconomic policies, adequate and reliable infrastructural development, quality

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<sup>28</sup> The United Republic of Tanzania, Planning Commission, *The Tanzania Development Vision 2025* (1999) <<http://www.tzonline.org/pdf/theTanzaniadevelopmentvision.pdf>>.

<sup>29</sup> Ibid.

<sup>30</sup> Ibid.

<sup>31</sup> Ibid.

education, promotion of information and communication Technologies (ICTs), effective utilisation of domestic resources, higher productivity and strengthening of the capacity to effectively anticipate and respond to external changes.<sup>32</sup> Another pillar identified is the ‘good governance and rule of law’ which can be achieved through harnessing the power of the market and the dynamism of private initiative to achieve high economic growth, striking a balance between the state and other institutions and promoting democratic and popular participation.<sup>33</sup>

Of note, Vision 2025 does not provide for the welfare of Tanzanian consumers. Whereas it emphasises ‘competence and competitiveness’, there is no mention of the role of consumers. This not only reflects the position of consumer representation in Tanzania, including within Acts such as the *Fair Competition Act* (the Act safeguarding consumer welfare in Tanzania);<sup>34</sup> but it also waters down any effort to protect consumers and provides a glimpse of the future of Tanzanian consumers.

In order to fully represent consumers, any competition measures put forward need to recognise and safeguard their welfare. The lack of recognition of consumers and their protection in Vision 2025 is clear evidence of the vacuum that exists in this area. Clearly, without a focus on consumer welfare, little will be achieved in competence and competitive strategies put forward in Vision 2025; as consumers play a major role in competition.<sup>35</sup> It is argued that ‘[c]onsumers not only benefit from competition, but also drive it, directly impacting on the competitiveness of firms and the productivity of a nation.’<sup>36</sup>

Vision 2025 is viewed with scepticism by some citizens.<sup>37</sup> It is argued that ‘there are many yet- to-be tackled problems which throw a shadow of doubt as to whether

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<sup>32</sup> Ibid.

<sup>33</sup> Ibid.

<sup>34</sup> This discussion is carried further in Chapter Five where the discussion elaborates how the Act provides little for consumer protection.

<sup>35</sup> Michael Waterson, ‘The Role of Consumers in Competition and Competition Policy’ (2003) 21 *International Journal of Industrial Organization* 129; Dennis W Carlton, ‘Competition, Monopoly, and Aftermarkets’ (2010) 26 *The Journal of Law, Economics, & Organization* 54.

<sup>36</sup> Office of Consumer Affairs (OCA), Canada, ‘Consumer Impact Assessment’ (Industry Canada, 5 December 2012) <[http://www.ic.gc.ca/eic/site/oca-bc.nsf/vwapj/ConsumerImpactReportEN.pdf/\\$FILE/ConsumerImpactReportEN.pdf](http://www.ic.gc.ca/eic/site/oca-bc.nsf/vwapj/ConsumerImpactReportEN.pdf/$FILE/ConsumerImpactReportEN.pdf)>.

<sup>37</sup> See discussions on the Tanzania Development Vision 2025 by Economic and Social Research Foundation (ESRF), *Review of Tanzania Development Vision 2025 (TDV 2025)* Tanzania Knowledge Network (23 September 2013) <[http://www.taknet.or.tz/viewclosedtopics.asp?topic\\_id=24&topic...](http://www.taknet.or.tz/viewclosedtopics.asp?topic_id=24&topic...)>.

anything is going to come out of the vision'.<sup>38</sup> These include corruption, the presence of weak civil society organisations, social service delivery systems which are only available to those who can pay, and a variety of political and economic problems.<sup>39</sup>

## **(b) East African Community**

Tanzania entered into regional integration with the East African countries of Kenya, Uganda, Rwanda and Burundi to form the East African Community (EAC).<sup>40</sup> This was established through a Treaty of the East African Community which was signed on 30 November 1999 and entered into force on 7 July 2000.<sup>41</sup> The integration which started with the three countries of Kenya, Tanzania and Uganda was later joined by Rwanda and Burundi in 2007.<sup>42</sup>

This integration is a positive move as it has the potential to widen the economic, political, social and cultural aspects so as to improve the quality of life of the people of East Africa,<sup>43</sup> and therefore the potential to have a positive impact on the consumer protection regime. However, the current reality does not reflect these prospects of consumer protection under the region.

There are several political, social and economic reasons which may result in a lack of practical protection for consumers under the EAC. The EAC was initially established in 1967 but collapsed in 1977.

At the time of its collapse, the regional integration had reached several milestones including establishing a common Customs Union and Common Market, established railways, harbours, airlines, civil aviation, inland waterways, road transport systems, post and telecommunications, power and lighting, customs and tax management,

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<sup>38</sup> Ernest T Mallya, *A Critical Look at Tanzania's Development Vision 2025* (1999) <<http://unpan1.un.org/intrdoc/groups/public/documents/idep/unpan002404.pdf>>.

<sup>39</sup> Ibid.

<sup>40</sup> East African Community, *About EAC* (26 September 2013)

<[http://www.eac.int/index.php?option=com\\_content&view=article&id=1&Itemid=53](http://www.eac.int/index.php?option=com_content&view=article&id=1&Itemid=53)>.

<sup>41</sup> Ibid.

<sup>42</sup> Ibid.

<sup>43</sup> Ibid.

health and medical research, aviation training and pesticides research.<sup>44</sup> Also established under the integration was the University of East Africa, the East African Court of Justice, an East African Legislative Assembly, and a regional Secretariat.<sup>45</sup> However, all this progress did not prevent the integration from collapsing.

Among the reasons for the collapse of the EAC were ideological differences, structural problems that impinged upon the management of common services, limited participation in decision-making, and a lack of compensatory mechanisms for addressing inequalities in the sharing of costs and benefits of integration.<sup>46</sup> The question then is whether those issues have been addressed under the current EAC regime or whether the members face the same challenges as previously? There is currently no clear answer to this question; however, various opinions reveal that people are in need of reassurance as to the prosperity of the integration.<sup>47</sup> Consequently, this, together with other situations facing members of EAC creates uncertainty to the success of e-consumer protection under the integration.

One notable feature among the member states is the difference in cultural and social backgrounds which is much influenced by the colonial history of each individual state. Consequently, there are different legal systems where Kenya, Tanzania and Uganda follow the common law system, while Rwanda and Burundi have adopted a civil law system. This raises challenges in forming one common legal instrument to be followed by member states. Whilst not impossible, implementation will require careful consideration to meet the requirements of all the member states in order to be

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<sup>44</sup> Juma V Mwapachu, *EAC: Past, Present and Future* (2009) <<http://www.firstmagazine.com/Publishing/SpecialistPublishingDetail.aspx?SpecialistPublicationId=24>>.

<sup>45</sup> Ibid.

<sup>46</sup> Diodorus Buberwa Kamala, *The Achievements and Challenges of the New East African Community Co-operation* (Research Memorandum No 58, June 2006) <<http://www2.hull.ac.uk/hubs/pdf/memorandum58.pdf>>; Mwapachu, above n 44.

<sup>47</sup> Kenneth Lubogo, 'Ugandans Should Brace for a Difficult Future in the EAC', *Sunday Monitor* (online), 9 August 2013 <<http://www.monitor.co.ug/OpEd/Commentary/Ugandans-should-brace-for-a-difficult-future-in-the-EAC/-/689364/1941428/-/jhhbp4mz/-/index.html>>; George Omondi, 'EAC Unity on Test as Tanzania Faces Isolation', *Business Daily* (online), 1 September 2013 <<http://www.businessdailyafrica.com/EAC-unity-on-test-as-Tanzania-faces-isolation/-/539546/1975748/-/qpxcpwz/-/index.html>>; Justin Nkaranga, 'East African Community is a Pipe Dream', *Standard Media Digital* (online), 1 September 2013 <<http://www.standardmedia.co.ke/?articleID=2000092455>>; Jackson Okoth, 'East African Community Citizens Yet to Benefit from Regional Integration', *Standard Media Digital* (online), 8 October 2013 <[http://www.standardmedia.co.ke/?articleID=2000095173&story\\_title=eac-citizens-yet-to-benefit-from-regional-integration](http://www.standardmedia.co.ke/?articleID=2000095173&story_title=eac-citizens-yet-to-benefit-from-regional-integration)>.

successful.

Another factor that may hinder the success of e-consumer protection through regional integration is the reality that member states are still developing their national initiatives on information technology and cyber matters.<sup>48</sup> As these national initiatives are still ongoing, there is a lack of successful measures that may act as a basis and backbone for regional initiatives. Even though the EAC members are similar in terms of their economic and development status; they each have individualistic characteristics, needs and differences that are reflected at the social and legal level. For instance, until recently, Tanzania, was a socialist country and had enjoyed a peace and harmony very different from the situation in Rwanda; which until recently was facing war and genocide.<sup>49</sup> Therefore, member states need to address their individualistic needs at a national level before they can embark on a successful process of harmonising regional initiatives.

Despite these differences, the EAC has been making efforts to address issues of cybersecurity and cyber law in general. This is revealed through the creation of recommendations for cyber laws known as East Africa Community Legal framework for Cyber laws 1 and 2.<sup>50</sup> The framework provides guidance to member countries in establishing their local cyber laws.<sup>51</sup> Whereas they attempt to address a spectrum of issues concerning cyber laws; a lot of issues which have been pointed out in this thesis have not been addressed. Consumer protection is addressed in general, leaving individual countries to deal with specific consumer protection issues,<sup>52</sup> consequently, issues such as the unique features of e-commerce present in Tanzania, payment concerns especially where mobile phone money is concerned, C2C e-commerce and the position and involvement of SMEs are among the issues which have not been addressed. The success of the proposed framework is in doubt even before its

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<sup>48</sup> Angeline Vere, *Legal and Regulatory Frameworks for the Knowledge Economy*, 1<sup>st</sup> sess, E/CA/CODIST/1/15 (26 March 2009)

<<http://repository.uneca.org/codist/sites/default/files/Concept%20Paper.pdf>>.

<sup>49</sup> The cultural and social practices of these countries results into unique features of electronic e-commerce. The unique features facing Tanzania e-consumers have been pointed out throughout the discussion in the thesis.

<sup>50</sup> UNCTAD, *Harmonizing Cyber laws and Regulations: The Experience of the East African Community* UN Doc UNCTAD/DTL/STICT/2012/4 (23 October 2012)

<<http://unctad.org/en/Pages/Publications/Cyberlegislation.aspx>>.

<sup>51</sup> Ibid.

<sup>52</sup> Ibid.

implementation. The need for Tanzania to address e-consumer concerns, particularly the concerns raised in this thesis, still remain.

#### **2.1.4 Background to the problem**

It is argued that e-commerce has been around since the early 1970s in some areas, when television advertisements began to include 800 numbers to order merchandise over the phone.<sup>53</sup>

E-commerce has developed through advances in computer systems and internal networks which were used to streamline business functions such as the order processing system. This system involved the digital transfer of data from one computer to another. The system was known as electronic data interchange (EDI).<sup>54</sup> E-commerce continued to grow passing several developments until reaching the internet/world wide web (www) phase.<sup>55</sup> E-commerce continues to grow and broaden every day, new features are emerging and the arena for e-commerce continues to expand. This can be seen in e-commerce in social media forums and mobile phones (known as m-commerce). It is predicted that e-commerce is yet to develop into something new leaving the internet and www behind.

The explosive growth in e-commerce is largely due to the expansion of the internet in the late 1990s.<sup>56</sup> The growth of e-commerce can be seen in the yearly transaction profits where e-commerce transactions grew from US \$11.2 billion in 1998 to US \$31.2 billion in 1999 and US \$1 trillion in the year 2012.<sup>57</sup> It is estimated this figure

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<sup>53</sup> Rolf T Wigand, 'Electronic Commerce: Definition, Theory, and Context' (1997) 13 *The Information Society: An International Journal*, 1

<<http://www.tandfonline.com/doi/abs/10.1080/019722497129241#preview>>.

<sup>54</sup> Miva Merchant, 'The History of E-commerce: How Did It All Begin?' on *Ecommerce Blog* (6 October 2011) <<http://www.mivamerchant.com/blog/the-history-of-ecommerce-how-did-it-all-begin>>.

<sup>55</sup> Ibid.

<sup>56</sup> Murat Ilkin, 'Impact of E-Commerce and Use of Information and Communications Technology On Promotion and Development of INTRA-OIC Trade' (2003) 24 (4) *Journal of Economic Cooperation* 81, 81-83.

<sup>57</sup> 'Ecommerce Sales Topped \$1 Trillion for First Time in 2012', *eMarketer* (online), 5 February 2013 <<http://www.emarketer.com/Article/Ecommerce-Sales-Topped-1-Trillion-First-Time-2012/1009649#dMO1ddBv5cpXWgbR.99>>.

will rise further to US \$1.5 trillion worldwide by the end of 2014.<sup>58</sup>

There has been an increase in the number of internet users worldwide over recent years; from 360,985,492 in 2000 to 2,802,478,934 in 2013.<sup>59</sup>

**Figure 2.3 World Internet Usage Growth From 2000 – 2013**

<b>WORLD INTERNET USAGE AND POPULATION STATISTICS December 31, 2013</b>						
<b>World Regions</b>	<b>Population ( 2014 Est.)</b>	<b>Internet Users Dec. 31, 2000</b>	<b>Internet Users Latest Data</b>	<b>Penetration (% Population)</b>	<b>Growth 2000-2014</b>	<b>Users % of Table</b>
<a href="#"><u>Africa</u></a>	1,125,721,038	4,514,400	<b>240,146,482</b>	21.3 %	5,219.6 %	8.6 %
<a href="#"><u>Asia</u></a>	3,996,408,007	114,304,000	<b>1,265,143,702</b>	31.7 %	1,006.8 %	45.1 %
<a href="#"><u>Europe</u></a>	825,802,657	105,096,093	<b>566,261,317</b>	68.6 %	438.8 %	20.2 %
<a href="#"><u>Middle East</u></a>	231,062,860	3,284,800	<b>103,829,614</b>	44.9 %	3,060.9 %	3.7 %
<a href="#"><u>North America</u></a>	353,860,227	108,096,800	<b>300,287,577</b>	84.9 %	177.8 %	10.7 %
<a href="#"><u>Latin America / Caribbean</u></a>	612,279,181	18,068,919	<b>302,006,016</b>	49.3 %	1,571.4 %	10.8 %
<a href="#"><u>Oceania / Australia</u></a>	36,724,649	7,620,480	<b>24,804,226</b>	67.5 %	225.5 %	0.9 %
<b><a href="#"><u>WORLD TOTAL</u></a></b>	<b>7,181,858,619</b>	<b>360,985,492</b>	<b>2,802,478,934</b>	<b>39.0 %</b>	<b>676.3 %</b>	<b>100.0 %</b>
NOTE: Internet Usage and World Population Statistics are for December 31, 2013.						

Source: Internet World Stats<sup>60</sup>

This advance in technology and e-commerce has an impact on business and consumers. New trends and features that did not exist before began to emerge including electronic/online sellers (e-sellers) businesses who did not have to establish themselves in physical locations and had numerous advantages, such as less or no tax,

<sup>58</sup> ‘Global B2C Ecommerce Sales to Hit \$1.5 Trillion This Year Driven by Growth in Emerging Markets’, *eMarketer* (online), 3 February 2014 <<http://www.emarketer.com/Article/Global-B2C-Ecommerce-Sales-Hit-15-Trillion-This-Year-Driven-by-Growth-Emerging-Markets/1010575>>.

<sup>59</sup> Internet World Stats, *Internet Users in the World: Distribution by World Regions – 2014 Q2* (30 June 2014) <<http://www.internetworldstats.com/stats.htm>>.

<sup>60</sup> *Internet Users in the World: Distribution by World Regions – 2014 Q2* (30 June 2014) <<http://www.internetworldstats.com/stats.htm>>.



fewer or no advertising expenses and fewer overhead expenses that offline businesses incur. Moreover, they had the opportunity to reach out to a large number of consumers both locally and internationally. Similarly, a new way of consuming entered the market; e-consumers could reach businesses anywhere in the world, with more product choices and quicker transactions.

Apart from all these advantages, e-commerce poses several risks to e-consumers. This new form of trading comes with new features and new risks. Problems that face offline consumers are also faced by online consumers; however, there is an element of extra vulnerability in facing such concerns in the electronic environment and hence e-consumers are placed in a more compromised position. In order to understand the e-consumer position and the risks they face in online transactions, we have to understand the position of consumers in offline transactions.

Similar to e-consumers, offline consumers are faced with several concerns regarding their welfare. It is argued that consumer concerns date as far back as the classical and medieval eras when trade was regulated through regional and social rules.<sup>61</sup> In this era, consumer affairs are much influenced by the work of scholars, philosophers and religious leaders. One such influence can be seen through the work of Marcus Tullius Cicero (Cicero) such as *De officiis*,<sup>62</sup> where he explains the difference between moral right and expediency by giving an example of a merchant who travels from Alexandria to Rhodes to find a market for his corn in a time of famine. The merchant is able to overtake other ships all carrying grain to Rhodes and arrived before anyone else. According to Cicero, upon arriving he should not withhold information about other ships he left behind, even whereby doing so, the price of his merchandise will fall.<sup>63</sup>

According to Cicero, he is not allowed to do so because:

...the concord which ought to exist among men, the affection which we ought

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<sup>61</sup> Susan S Silbey, 'Who Speaks For the Consumer? Nader's No Access to Law and Best's When Consumers Complain' (1984) 9 *Law and Social Inquiry* 429, 429.

<sup>62</sup> Anthony Duggan, Michael Bryan and Frances Hanks, *Contractual Non-Disclosure* (Longman, 1994)

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<sup>63</sup> Ibid 1-3.

to bear to each other, cannot permit us to prefer our private interest to the interest of our neighbour, from whence it follows that, though we may conceal some things from prudence, we cannot conceal, for the sake of profit, facts which those with whom we contract have an interest in knowing.<sup>64</sup>

Another influential voice was Thomas Aquinas, a theologian who is believed to 'have transformed the doctrine of good faith and fair dealing into a theological tenet.'<sup>65</sup> He purported that 'a seller is bound to reveal secret flaws that may occasion loss through a decrease of the value of the article,'<sup>66</sup> however, he has no duty to reveal the flaw if it manifests itself.<sup>67</sup>

As society continued to progress, other principles addressing consumer concerns also developed, among them, the caveat emptor principle. It is said that this principle incorporates the spirit of individualism and individual autonomy in the market place.<sup>68</sup>

The caveat emptor principle requires buyers to be aware and make the purchasing decision at their own risk. It is argued that the doctrine worked under the assumption that both sellers and buyers had equal bargaining power and that it was not an obligation of the seller to furnish information.<sup>69</sup> The principle placed consumers at a disadvantage with little protection in case of a grievance.

The doctrine of caveat emptor is elaborated in the case of *Chandelor v Lopus* (1603) 79 ER 3,<sup>70</sup> which is regarded as the origin of the doctrine under the common law.<sup>71</sup> In this case, a goldsmith sold a stone to the plaintiff purporting it to be a rare Bezar stone. Bezar stone was found in the stomachs and intestines of goats and was believed to have medicinal value. The buyer later claimed that the stone was not Bezar stone.<sup>72</sup> The court held against the plaintiff as there was not enough evidence of a written

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<sup>64</sup> Sheldon Gardner and Robert Kuehl, 'Acquiring an Historical Understanding Of Duties To Disclose, Fraud, And Warranties' (1999) 104 *Commercial Law Journal* 168, 171.

<sup>65</sup> Ibid 172.

<sup>66</sup> Walton H Hamilton, 'The Ancient Maxim Caveat Emptor' (1931) 40 *Yale Law Journal* 1133, 1138.

<sup>67</sup> Ibid.

<sup>68</sup> Silbey, above n 62, 429.

<sup>69</sup> Alan M Weinberger, 'Let the Buyer Be Well Informed? Doubting the Demise of Caveat Emptor' (1996) 55 *Maryland Law Review* 387, 390-2.

<sup>70</sup> Ibid 392.

<sup>71</sup> Ibid 392-3.

<sup>72</sup> Ibid.

warrant. The court was of the view that the goldsmith had merely affirmed and not warranted the character of the stone.<sup>73</sup> It came to be interpreted that ‘English courts were not interested in enforcing the fairness of an exchange because they thought contracting parties should handle such matters themselves.’<sup>74</sup>

As society continued to develop, it became necessary to address the unsatisfactory status of consumer welfare and more consumer protection principles and regulations were developed. It is argued that the development principles of warranty, especially the implied warranty of quality, are one of the measures addressing the insufficient protection through the principle of caveat emptor.<sup>75</sup> However, this measure was also not without flaws. The requirements and conditions imposed for the validity of the warranty made it difficult for consumers to seek remedy through it.<sup>76</sup> It is contended that:

The capacity of warranty law to curb the sharp practices associated with caveat emptor and to secure confidence in the marketplace is undercut if the buyer's rights to obtain a remedy for breach of warranty are subject to rules that cut off the buyer's rights too quickly.<sup>77</sup>

These developments resulted in the formation of other principles addressing consumer concerns, mostly through case law. In *Langridge v Levy*,<sup>78</sup> a gun bought by a father exploded in the son's hands. The court was of the view that the son could not seek remedy as it was the father who bought the gun. However, he could seek remedy for fraud as the manufacturer had given a written warranty on the safety of the gun, but this was not the case. The seller misrepresented the facts.

There are several other cases that set a foundation for liabilities and responsibilities for sellers such as in *George v Skivington*,<sup>79</sup> *Donoghue v Stevenson*,<sup>80</sup> *Hedley Byrne &*

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<sup>73</sup> Ibid.

<sup>74</sup> Ibid.

<sup>75</sup> John C Reitz, ‘A History of Cutoff Rules as a Form of Caveat Emptor: Part I-The 1980 U. N. Convention on the International Sale of Goods’ (1988) 36 *American Journal of Comparative Law* 437, 437.

<sup>76</sup> Ibid.

<sup>77</sup> Ibid 438.

<sup>78</sup> (1837) 2 M & W 519.

<sup>79</sup> (1869) LR 5 Ex 1.

*Co Ltd v Heller & Partners Ltd*<sup>81</sup> and *Home Office v Dorset Yacht Co Ltd*.<sup>82</sup> The principles established in these and other cases contributed much to the development of consumer protection as they watered down the doctrine of caveat emptor and made manufacturer, traders and those who deal with consumers more responsible for their actions.

There are also several early movements aiming at representing consumer interests. Efforts were made through means such as educating people through publications and consumer movements. Among the written work intended to address consumer concerns include *The Jungle*, by Upton Sinclair in 1906, *Your Money's Worth*, by Stuart Chase and F J Schlink in 1927, *100,000,000 Guinea Pigs*, by Arthur Kallett and F J Schlink in 1933, and *Unsafe at Any Speed: The Designed-in Dangers of the American Automobile*, by Ralph Nader in 1965. Several consumer protection measures were enacted as a result of the movements calling for consumer protection. Among the early efforts were the enactment of *Adulteration of Food and Drink Act of 1860* in England and the establishment of the US Federal Trade Commission (US FTC) in 1914. These were the beginnings of a commitment to consumer protection initiatives which are now reflected through several governments, and at both a regional and international level.

Further efforts in consumer protection can be seen through the initiatives of addressing a new wave of consumer protection concerns that emerged as a result of e-commerce.<sup>83</sup> The development of e-commerce has made it necessary to readdress consumer protection initiatives.<sup>84</sup> This is because the existing initiatives do not sufficiently answer all concerns raised in e-commerce.<sup>85</sup>

International initiatives have addressed issues arising from e-commerce. However, in order for these initiatives to be effective, they need to be incorporated into national

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<sup>80</sup> [1932] AC 562.

<sup>81</sup> [1964] AC 465.

<sup>82</sup> [1969] 2 QB 426.

<sup>83</sup> Such as initiatives taken by the United Nation (UN), the Organisation for Economic Co-operation and Development (OECD) and other regional, international and national authorities.

<sup>84</sup> David Harland, 'The Consumer in the Globalized Information Society - The Impact of the International Organizations' in Thomas Wilhelmsson et al (eds), *Consumer Law in the Information Society* (Kluwer Law International, 2001) 6, 7.

<sup>85</sup> Ibid.

initiatives. Furthermore, countries need to ensure that the adaptation of these measures reflect their local needs whilst also addressing cross-border transactions. This is more so for countries like Tanzania whose e-commerce has distinctive features and is influenced by the culture of the people.

Consumer protection development in Tanzania is influenced by its development phases. Several years after independence from colonial power, Tanzania adopted socialism principles. Few consumer protection initiatives were present at this stage. It is argued that consumer policy and consumer law does not exist in socialist economic systems.<sup>86</sup> Later on, Tanzania moved to a liberalised economy, but the market remained unregulated until eight years later, in 1994, when the *Fair Trade Practices Act* was enacted. Consumer protection in Tanzania is relatively new, and has yet to reach maturity. Similarly, e-consumers are rendered little protection due to lack of specific laws addressing their concerns. . There is a need of appropriate measures to address e-consumers problems in the country.

## 2.2 KEY CONCEPTS OF THE RESEARCH

### ***E-consumers***

In order to define e-consumer it is essential that we define who is a consumer. According to the Tanzanian government, a consumer is:

Any person who purchases or offers to purchase goods or services otherwise than for the purpose of resale but does not include a person who purchases any goods or services for the purpose of using them in the production or manufacture of any goods or articles for sale.<sup>87</sup>

The definition excludes anyone who acquires goods for resale or reproduction and/or manufacturing. An important point to consider in this definition is whether it is

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<sup>86</sup> Heiki Pisuke, 'The Influence of Social Reforms and the Information Society on Consumers in a Transition Economy' in Thomas Wilhelmsson et al (eds), *Consumer Law in the Information Society* (Kluwer Law International, 2001) 31, 33.

<sup>87</sup> *Fair Competition Act, 2003* (Cap 285 R.E. 2002).

relevant to consumers who engage in e-commerce and encompasses the current status of e-commerce. The definition is wide enough and it encompasses a range of individuals purchasing goods and services. However, as will be elaborated further, the definition does not encompass all groups that may need protection due to acquiring ownership of products or services electronically. In particular, the small and medium-sized enterprises (SMEs)<sup>88</sup> in Tanzania who, even though they may be acquiring goods for the purpose of resale are still affected with consumer concerns when they engage in e-commerce. Moreover, it is uncertain that this definition includes consumers engaging in C2C e-transactions. This is due to the fact that these consumers may acquire goods knowing that they can easily dispose of them through C2C e-transactions after they no longer need the items.

While it is essential that the definition of consumers is wide enough and covers other groups such as SMEs and consumers who engage in C2C e-transactions; it is also important to set a limit as to the extent of the protection and to set out obligations that must be met, particularly as the consumer may also be a seller.

One consumer definition that has met with approval<sup>89</sup> and is worth noting here is that given by the South African *Consumer Protection Act 2008* (herein referred to as the *CPA*). It is argued that the *CPA* gives a broader definition of consumers.

The *CPA* defines consumer in respect of any particular goods or services, to mean:

- (a) a person to whom those particular goods or services are marketed in the ordinary course of the supplier's business;
- (b) a person who has entered into a transaction with a supplier in the ordinary course of the supplier's business, unless the transaction is exempt from the application of this Act ...
- (c) ...a user of those particular goods or a recipient or beneficiary of those particular services, irrespective of whether that user, recipient or beneficiary was a party to a transaction concerning the supply of those particular goods or

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<sup>88</sup> See definition of SMEs, below n 111.

<sup>89</sup> Justin Malbon and Luke Nottage (eds), *Consumer Law and Policy in Australia and New Zealand* (Federation Press, 2013) 49.

services; and

(d) a franchisee in terms of a franchise agreement, to the extent applicable in terms of section 5(6)(b) to (e)<sup>90</sup>

By this definition, the *CPA* applies to every transaction that involves a supply of goods or services unless there is an exemption by law.<sup>91</sup> This implies that all transactions are covered by the Act including B2B and C2C transactions. The key here is the supply of goods or service from the supplier to the consumer. Moreover, it is noted that the Act further protects the user or beneficiary of such goods or services, protection which is lacking in Tanzania's *Fair Competition Act*. It will be proposed that Tanzania modify its provision defining 'consumer' and refer to the *CPA* definition as a reference.

Through the above definitions one can confidently define an e-consumer to be a consumer who transacts electronically. For the purpose of this thesis, 'e-consumer' will refer to consumers who transact in any electronic form including e-commerce, m-commerce and in social media, social networks and forums or blogs. Moreover, the term online consumers will be used to refer to e-consumer. Specific use of the terms e-consumer, m-consumer, C2C e-consumer and SMEs e-consumer will be used when there is a need to specifically identify each group separately. This will be clearly expressed in the discussion.

It is further noted that the terminologies of e-consumer seller and e-consumer buyers have been coined and used for C2C e-transactions where both parties are viewed as, and in reality, are consumers. It is acknowledged that among the problems raised in this thesis are concerns facing C2C e-transactions. The root of these problems is recognition and acknowledgement that such transactions need to be under the umbrella of consumer protection and parties engaging under such transactions need to be protected.<sup>92</sup> It is also noted in the

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<sup>90</sup> *Consumer Protection Act (CPA) 2008* (South Africa) 1.

<sup>91</sup> Malbon and Nottage, above n 89, 50.

<sup>92</sup> This point is validated by the recognition of the mentioned problems by international bodies and their efforts in encouraging discussion and initiatives towards C2C consumer concerns. One example of such recognition is by the OECD which was reflected through the OECD 'Conference on Empowering E-consumers: Strengthening Consumer Protection in the Internet Economy', which reviewed the ten years after enactment of the OECD Guidelines for Consumer Protection in the Context of Electronic

thesis that whereas the traditional C2C transactions did not need such much attention, the same is not the case with the C2C e-transactions. The online characteristics and environment has changed many aspects of C2C e-transactions conducted online and has raised several difficulties and concerns which need to be addressed in order to safeguard the welfare of the consumers. Among the concerns is the fact that consumers are increasingly using the internet as a means to sell goods and services in C2C transactions, and hence carrying out obligations of the seller. These sellers in C2C e-transactions are helpless disadvantaged consumers with less or equal bargaining powers to buyers, and hence there need to be measures that will not only differentiate such sellers who are merely consumers but also that will protect them and define them, their rights and obligations.<sup>93</sup> In noting this element these sellers will be referred herein as e-consumer sellers. It is with the same element that the term ‘e-consumer buyer’ is created.

### ***Consumer protection***

The term consumer protection is not provided for in the Tanzanian *Fair Competition Act*. The Oxford Dictionary defines consumer protection, also termed as consumerism as a ‘protection or promotion of the interests of consumers’.<sup>94</sup> A similar definition is given in Black’s Law Dictionary where it defines consumerism to mean ‘efforts of parties to protect the consumer from contracts that would take away their rights in business....’<sup>95</sup>

Moreover, consumer protection laws are defined to mean ‘the sum total of the ways in

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Commerce 1999 where it was acknowledges that there is a need to address new trends and issues arising from C2C transactions and that e-consumers transacting in C2C transactions are protected. See OECD, ‘Conference on Empowering E-consumers: Strengthening Consumer Protection in the Internet Economy’ (Background Report, OECD, 8-10 December 2009) <<http://www.oecd.org/ict/econsumerconference/44047583.pdf>>.

<sup>93</sup> This discussion is carried further below. See discussion on Consumer to consumer e-commerce (C2C) below.

<sup>94</sup> Oxford Dictionaries, *Oxford Dictionary Online* (2 September 2014) <<http://www.oxforddictionaries.com/definition/english/consumerism>>.

<sup>95</sup> The Law Dictionary, *The Law Dictionary Featuring Black's Law Dictionary Free Online Legal Dictionary 2nd Ed* (4 November 2013) <<http://thelawdictionary.org/consumerism/>>.



which a state constitutes, defines and intervenes in markets for the purpose of protecting the ultimate consumer of good and services.’<sup>96</sup>

It is argued that ‘the basic foundation of consumer protection is the need for consumers to have what they want, at a reasonable price, without danger or inconvenience.’<sup>97</sup> Consumer protection has been necessary due to the weak position of consumers relative to businesses, a situation which was complicated more by a presence of principles and doctrines such as caveat emptor which were detrimental to consumers.<sup>98</sup> Consumer protection laws are seen as a matter of national interest and national standards. They are a method of correcting failures in the market system.

Clearly, consumer protection intends to protect consumers against unfair trade practices and unequal bargains among other reasons. It is ‘the public intervention of the private market.’<sup>99</sup> The public intervention in consumer transactions creates a special model of transaction which is safeguarded by the law. This view will be adopted while addressing consumer issues in this thesis. Consumer transactions will be regarded as transactions with public interests that involve sellers/businesses and consumers. The private aspects of contract law will not be considered. Although consumer law begins with contract it extends further to issues such as producer liability.

This specific approach is preferred to bring clarity when discussing e-commerce and e-consumer concerns in the thesis. It provides a clear demarcation between consumer transaction principles and contractual principles. Issues such as time of contractual formation, validity of contractual signatures and the requirements of contracts in writing, which govern Tanzania contracts, are not covered in the scope of this discussion.

This approach is also proposed when addressing e-consumer concerns in Tanzania by

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<sup>96</sup> Iain Ramsay (ed), *Consumer Law: The International Library of Essays in Law & Legal Theory Areas* 6 (Dartmouth Publishing, 1992) xi.

<sup>97</sup> John Goldring, *The Choice Edition of Consumer or Victims? A Guide to Consumer Protection Law in Australia* (Allen & Unwin and the Australian Consumers’ Association, 1988) 3.

<sup>98</sup> Brian W Harvey and Deborah L Parry, *The Law of Consumer Protection and Fair Trading* (Butterworths, 3rd ed, 1987) 13.

<sup>99</sup> Ramsay, above n 94, xii.

the government as this solidifies consumer laws and protection in the country. Moreover, it will bring clarity and remove doubts that may be caused by the existing laws. Without this distinction, consumers may be subjected to other principles which may not be of interest to consumer protection as a public policy. Examples of this are the doctrines of caveat emptor and privity of contract. In the case of *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* [1915] AC 847, the plaintiff, a tyre manufacturing company, sold tyres at a discount price to Messrs Dew, business buyers, under the condition that they should not resell the tyres at less than the listed price. This condition applied even to any other business which would buy tyres from Messrs Dew. Dew sold the tyres to Selfridge & Co Ltd, however; Selfridge did not adhere to the conditions. Dunlop Pneumatic Tyre Co brought action against Selfridge Company. The court held that the doctrine of privity requires that only a party to a contract can sue.

The effect of the doctrine is that, without clear distinction of consumer transactions and their governing laws, only those consumers who are party to the contract may seek remedy. The law of contract in Tanzania is silent on the doctrine of privity of contract. However, a third party is only allowed to furnish consideration for a promise but the law does not allow him or her to seek redress through the contract even where he or she has furnished a consideration.<sup>100</sup> Clearly, if this contract principle is applied to consumer transactions, it will lead to further complications rather than offering solutions.

Another example is the contract requirement of furnishing consideration. In the case of *Currie v Misa* (1875) LR 10 Ex 153, Lush J defined consideration as '[a] valuable consideration, in the sense of the law, may consist either in some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other.'<sup>101</sup> According to the Tanzanian law of contract, consideration is defined as:

When at the desire of the promisor, the promisee or any other person has done

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<sup>100</sup> Nicholas N N Nditi, *General Principles of Contract Law in East Africa* (Dar es salaam University Press, 1st ed, 2009) 118.

<sup>101</sup> *Currie v Misa* (1875) LR 10 Ex 153, 162.

or abstained from doing something, or does or abstain from doing, or promises to do or abstain from doing something, such act or abstinence or promise is called a consideration for the promise.<sup>102</sup>

The provision implies that consideration needs to be present in order to form a legal agreement. This contractual requirement is not always fulfilled in the consumer transaction. The nature of consumer law requires sellers and businesses to perform certain acts for the benefit of the consumers regardless of whether there is a consideration or not. Consumer information, education, and other services are offered to consumers without expecting them to be obligated to buy goods or services from sellers or businesses; yet sellers and businesses can be held accountable for misleading consumers where such information contains untrue statements. This scenario points to the need to go beyond contract law principles when dealing with consumers matters.

The above situation is similar to two further requirements in the doctrine of consideration. These are; the requirement that consideration must be given at the desire of the promisor, and consideration must be furnished by the promisee only.<sup>103</sup> These requirements are elaborated further in case law. In *Durga Prasad v Baldeo* (1880) 3 All 221,<sup>104</sup> where after building shops at a bazaar, the plaintiff let the defendant occupy some of them with a promise of commission payments out of the goods they were going to sell; the defendants did not keep their word. In the judgment, it was held that the plaintiff built the shops at his own desire, and not those of the defendants hence there was no consideration.<sup>105</sup> In the case of *Tweddle v Atkinson* [1861] EWHC J57 (QB),<sup>106</sup> the court held that no stranger to the consideration can take advantage of a contract although made for his benefit. These principles may not always exist in consumer transactions. It is common for a consumer to purchase goods and services to be consumed by his family and the consumer protection regime renders protection to all of them. The consumer protection regime provides more for the consumers than the protection rendered from contract law principles. For instance,

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<sup>102</sup> *The Law of Contract Act* [CAP 345 R.E. 2002] 2(1)(d).

<sup>103</sup> Nditi, above n 98, 66.

<sup>104</sup> Ibid.

<sup>105</sup> Ibid.

<sup>106</sup> Ibid 69.

the consumer protection regime requires consumer education among other things which is beyond the principles of the law of contract.

The need to distinguish consumer transactions for the purpose of safeguarding their welfare is not new. In Aviva Freilich and Lynden Griggs, 'Just Who is the Consumer? Policy Rationales and a Proposal for Change',<sup>107</sup> the authors argue that the discipline of consumer protection law has consistently been overshadowed by general contract law and that it is time that consumer protection steps away from the confines and strictures of contract law.<sup>108</sup>

Furthermore, Arthur Allen Leff in 'Contract as a Thing',<sup>109</sup> is of the view there is a need for a new metaphoric framework for thinking about consumer transactions instead of regarding them as contract. The author argues that '[e]verything is what it is, and not another thing.'<sup>110</sup> He clarifies this further by stating:

...you cannot make classes the easy way, by putting together identical things. There are no identical things. Identity...is solely an intellectual construct: an identical thing is a thing which would be another thing except that it isn't. ...there is no such thing as a thoroughly homogenous class.<sup>111</sup>

The author contends that to call consumer transactions contracts is to carry out the most basic step in legal reasoning, the easy legal clarification of a thing.<sup>112</sup>

It is essential here to state that consumer contracts will be referred to as consumer transactions in this work. Similarly, consumer electronic contracts will be referred to as consumer e-transactions, e-consumer transactions or simply e-transactions.

### ***Small and medium enterprises***

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<sup>107</sup> In Justin Malbon and Luke Nottage (eds), *Consumer Law and Policy in Australia and New Zealand* (Federation Press, 2013).

<sup>108</sup> Ibid.

<sup>109</sup> Ramsay, above n 94, 131.

<sup>110</sup> Ibid 132.

<sup>111</sup> Ibid.

<sup>112</sup> Ibid.

According to the Tanzania *Small and Medium Sized Enterprises Development Policy* of 2002 (SMEs Policy),<sup>113</sup> SMEs are micro, small and medium businesses defined according to the criteria based on the capital investment, sales turnover and number of employees, set by the government.<sup>114</sup> According to the policy, businesses engaging up to four people or having a capital up to 4 million Tanzanian Shillings (Tshs)<sup>115</sup> are categorised as micro enterprises.<sup>116</sup> Small enterprises are those engaging between 5 and 49 employees or with capital investment from 5 million (Tshs) to 200 million (Tshs), whereas medium enterprises are the ones employing between 50 and 99 people or with capital investment from 200 million (Tshs) to 800 million (Tshs) (see Figure 2.4).<sup>117</sup>

It is argued that ‘there is no universally accepted definition of SMEs. Different countries use various measures of size depending on their level of development.’<sup>118</sup> For this reason, the definition for this study will remain that offered by the Tanzania government.

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<sup>113</sup> The United Republic of Tanzania, Ministry of Industry and Trade, *Small and Medium Enterprise Development Policy 2002* (2002) <[www.sido.go.tz/images/smepolicy.pdf](http://www.sido.go.tz/images/smepolicy.pdf)>.

<sup>114</sup> Ibid.

<sup>115</sup> One United States Dollar (US\$) is equivalent to Tanzania Shillings (Tshs) 1,738 according to Bank of Tanzania on 3rd December 2014.

<sup>116</sup> The United Republic Of Tanzania, above n 111, 3.

<sup>117</sup> Ibid.

<sup>118</sup> Ibid.

**Figure 2.4 Categories of SMEs in Tanzania**

Category	Employees	Capital Investment in Machinery (Tshs.)
Micro enterprise	1 – 4	Up to 5 mil.
Small enterprise	5 – 49	Above 5 mil. to 200 mil.
Medium enterprise	50 – 99	Above 200mil.to 800 mil.
Large enterprise	100 +	Above 800 mil.

Source: The United Republic of Tanzania, Ministry of Industry and Trade<sup>119</sup>

It is estimated that more than 95% of businesses in Tanzania are small enterprises, where they contribute about 35% of the country's Gross Domestic Product (GDP) and generate up to 40% of total employment.<sup>120</sup>

A large proportion of SMEs in Tanzania are in what is considered the informal sector; characterised by predominantly women (64% of informal sector activities are run by women), covering activities such as small scale manufacturing and food services.<sup>121</sup>

SMEs in Tanzania are characterised by a low level of formalization where most are sole proprietors, and only a few are registered and have a tax identification number (TIN).<sup>122</sup> It is estimated that half the SMEs entrepreneurs have limited formal education and training.<sup>123</sup> SMEs in Tanzania are also faced with several challenges such as a lack of credit facilities or/and high costs of credit, very limited access to banking institutions due to factors such as unreliable power supply, poor quality of infrastructure, high transport costs and limited access to markets.<sup>124</sup>

It is essential to mention the characteristics of business importation in Tanzania, which reflects not only SMEs but all businesses. In Tanzania, ‘nearly all goods are

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<sup>119</sup> Ibid.

<sup>120</sup> Tanzania Chamber of Commerce, Industry and Agriculture, *Introduction to Entrepreneurship* (2009) <<http://www.tccia.com/tcciaweb/SMEtoolkit/introduction.htm>>.

<sup>121</sup> The United Republic Of Tanzania, above n 111.

<sup>122</sup> Ibid.

<sup>123</sup> Ibid.

<sup>124</sup> Ibid.

distributed through wholesalers and retailers'.<sup>125</sup> It is common practice for wholesale businesses to import goods in bulk from manufacturers or other wholesalers abroad.<sup>126</sup> These goods are then distributed/sold to the local businesses. It is also common for the wholesalers to own chains of supermarkets where goods may also be sold through retail.<sup>127</sup>

## **E-commerce**

It is argued that there is no single accepted definition of e-commerce.<sup>128</sup> This is partly due to new forms of e-commerce emerging every day.<sup>129</sup> This statement is evidenced by the struggle to define e-commerce. Such is elaborated in the definitions on electronic commerce offered by several institute below.

In 2000 the OECD offered a broader and narrow definition of e-commerce where, in its broader sense, it defined e-commerce as 'the sale or purchase of goods or services, whether between businesses, households, individuals, governments, and other public or private organisations, conducted over computer mediated networks.'<sup>130</sup> In the narrow sense, e-commerce was defined to mean 'the sale or purchase of goods or services, whether between businesses, households, individuals, governments, and other public or private organisations, conducted over the Internet.'<sup>131</sup>

These definitions applied based on the method used to place or receive the order and not the payment or the channel of delivery. This resulted in two categories; namely electronic commerce which encompasses the broader definition, and internet commerce which encompass the narrow definition. Both definitions consider the goods and services ordered over those networks, but the payment and ultimate

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<sup>125</sup> United States of America, Department of Commerce, 'Selling U.S. Products and Services' in *Doing Business in Tanzania: 2011 Country Commercial Guide for U.S. Companies* (2011)  
<[http://www.google.com.au/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&cad=rja&uact=8&ved=0CDIQFjAB&url=http%3A%2F%2Fphotos.state.gov%2Flibraries%2Ftanzania%2F231771%2FPDFs%2FCountry\\_Commercial\\_Guide\\_2011\\_Tanzania.pdf&ei=r7kkVIqpEMGF8gXD6IH0Bg&usg=AFQjCNGPQmD0JudFkQqCvH-8Q-Ok6ipG7w&bvm=bv.76247554,d.dGc](http://www.google.com.au/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&cad=rja&uact=8&ved=0CDIQFjAB&url=http%3A%2F%2Fphotos.state.gov%2Flibraries%2Ftanzania%2F231771%2FPDFs%2FCountry_Commercial_Guide_2011_Tanzania.pdf&ei=r7kkVIqpEMGF8gXD6IH0Bg&usg=AFQjCNGPQmD0JudFkQqCvH-8Q-Ok6ipG7w&bvm=bv.76247554,d.dGc)>.

<sup>126</sup> Ibid.

<sup>127</sup> Ibid.

<sup>128</sup> Cristina Coteanu, *Cyber Consumer Law and Unfair Trading Practices* (Ashgate, 2<sup>nd</sup> ed, 2005) 2.

<sup>129</sup> Ibid.

<sup>130</sup> OECD, *Measuring the Information Economy* (5 November 2013)

<<http://www.oecd.org/sti/ieconomy/measuringtheinformationeconomy.htm>> 61.

<sup>131</sup> Ibid.

delivery of the good or service may be conducted on or off-line.<sup>132</sup>

These definitions were modified in 2009 when the term e-commerce was defined to ‘[i]nclude any transaction for the sale or purchase of goods and services conducted over computer networks by methods specifically designed for the purpose of receiving or placing of orders.’<sup>133</sup> It further provides ‘[p]ayment and the ultimate delivery of the goods or services do not have to be conducted online, while orders made by telephone calls, facsimile or manually typed e-mail are excluded. To be included in e-commerce are orders made over the web, extranet or electronic data interchange.’<sup>134</sup>

The European Commission states, ‘e-commerce is about doing business electronically. It is based on the electronic processing and transmission of data, encompasses many diverse activities including electronic trading of goods and services, on-line delivery of digital content, electronic funds transfers, electronic share trading, public procurement, and so on.’<sup>135</sup>

The Commission divides these activities into two categories; indirect e-commerce where there is electronic ordering of goods that still need to be physically delivered, and depends on a number of external factors, such as the efficiency of the transport system and postal services;<sup>136</sup> and direct e-commerce where the transactions are fully concluded online with no physical or offline involvement. This may include products such as computer software and entertainment content. The Commission further states that e-commerce is not limited to the internet, but includes other applications such as videotex, tele-shopping and catalogue sales on CD-Rom.<sup>137</sup> These definitions are useful in identifying the trends underlying the growth of e-commerce and providing a map for the future, but they do not help developing countries fit in.<sup>138</sup>

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<sup>132</sup> Ibid.

<sup>133</sup> OECD, above n 2, 6.

<sup>134</sup> Ibid.

<sup>135</sup> Commission of the European Communities, *A European Initiative in Electronic Commerce* (COM(97) 157 final, 16 April 1997)

<[http://europa.eu/legislation\\_summaries/information\\_society/other\\_policies/132101\\_en.htm](http://europa.eu/legislation_summaries/information_society/other_policies/132101_en.htm)>.

<sup>136</sup> Ibid.

<sup>137</sup> Ibid.

<sup>138</sup> UNCTAD, *Building Confidence: Electronic Commerce and Development* UN Doc UNCTAD/SDTE/MISC.11 (2000) 13 <[http://r0.unctad.org/ecommerce/docs/edr00\\_en.htm](http://r0.unctad.org/ecommerce/docs/edr00_en.htm)>.



It is argued that in order for the third world to integrate with profit in e-commerce, they will need more than these definitions; something that will provide a sense of direction and a clear vision of what steps should be taken. Hence, there is a need for a more directional definition of e-commerce other than the present descriptive definition of e-commerce. These operational definitions will serve as a practical basis for action by offering developing countries avenues to design and implement appropriate strategies to succeed in the world of e-commerce.<sup>139</sup>

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<sup>139</sup> Ibid.

**Figure 2.5 Various Descriptive Definitions of Electronic Commerce**

<p>"Electronic commerce, defined simply, is the commercial transaction of services in an electronic format." (<i>Transatlantic Business Dialogue Electronic Commerce White Paper</i>, 1997)</p>
<p>"Electronic commerce refers generally to all forms of transactions relating to commercial activities, including both organizations and individuals that are based upon the processing and transmission of digitized data, including text, sound, and visual images." (OECD, 1997)</p>
<p>"Electronic commerce is about doing business electronically. It is based on the electronic processing and transmission of data, including text, sound, and video. It encompasses many diverse activities including electronic trading of goods and services, online delivery of digital content, electronic fund transfers, electronic share trading, electronic bills of lading, commercial auctions, collaborative design and engineering, online sourcing, public procurement, direct consumer marketing, and after-sales service. It involves both products (consumer goods, specialized medical equipment) and services (information services, financial and legal services); traditional activities (healthcare, education) and new activities (virtual malls)." (European Commission, 1997)</p>
<p>"Electronic commerce is the carrying out of business activities that lead to an exchange of value across telecommunications networks." (European Information Technology Observatory, 1997)</p>
<p>". . . electronic commerce, which has been limited to a number of specified companies, is entering a new era where many unspecified persons including general consumers are involved on the networks. In addition, its contents have come to include not only simple transactions of data concerning placing orders or order acceptance but also to general commercial acts such as publicity, advertisements, negotiations, contracts, and fund settlements." (Ministry of International Trade and Industry, Japan, 1996)</p>

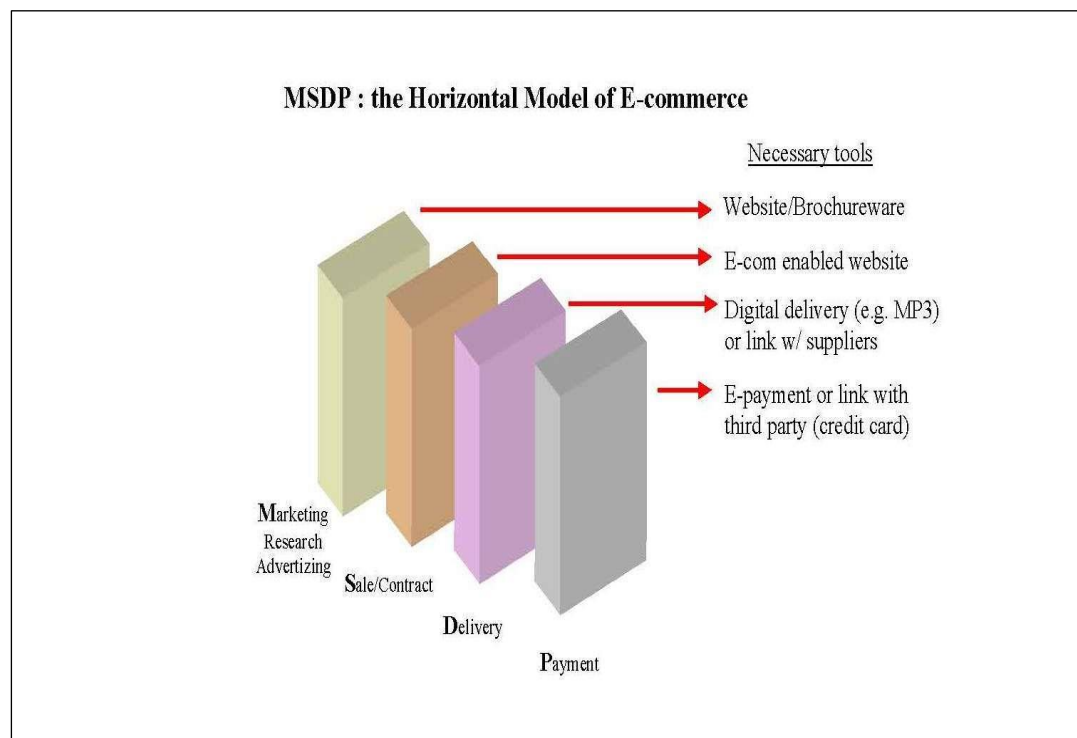
Source: UNCTAD<sup>140</sup>

<sup>140</sup> Ibid 14.

UNCTAD offers two operational definitions of e-commerce; a horizontal definition which corresponds to the transactional aspects of e-commerce, and a vertical definition which focuses on the various layers of requirements necessitated by the implementation of an e-commerce.<sup>141</sup>

In the horizontal definition, e-commerce is defined with regard to its transactional aspect including the presence of marketing, contract, delivery and payment. If at least two out of these three components of the model are performed on the network, it can then be defined as e-commerce. This is described further in the figure below.

**Figure 2.6 UNCTAD Horizontal Description of Electronic Commerce**



Source: UNCTAD<sup>142</sup>

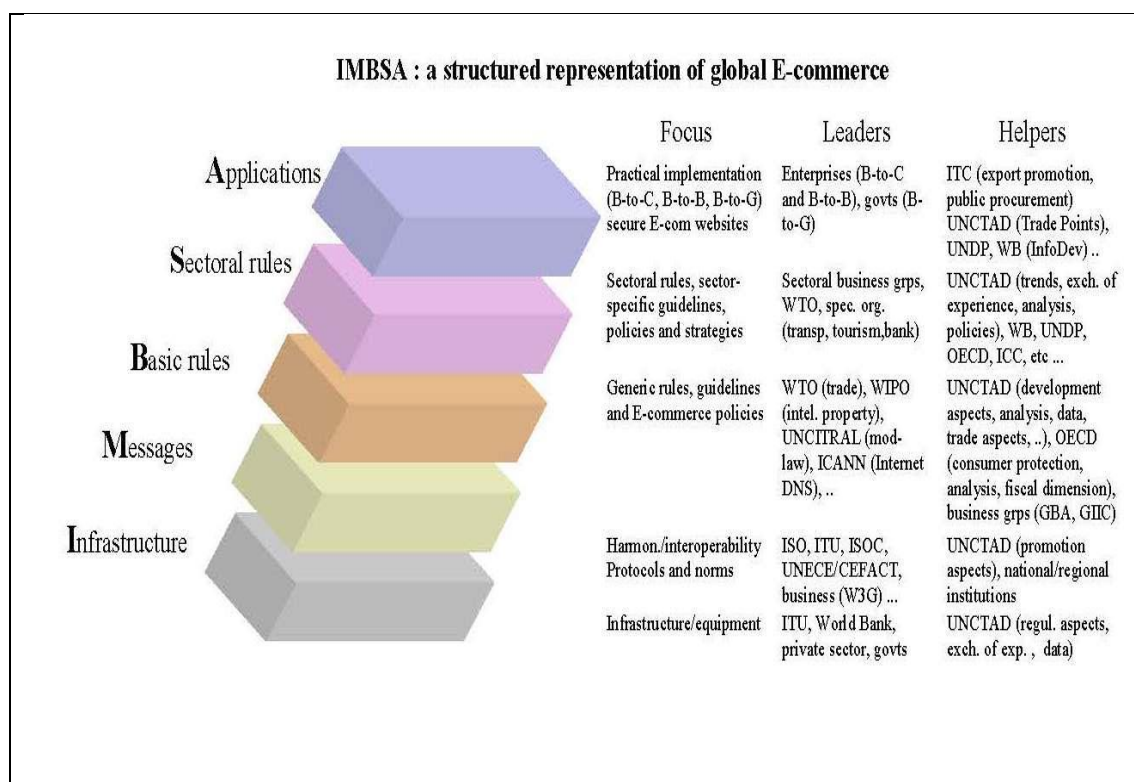
Instead of focusing on the steps of an e-commerce transaction as with the horizontal definition, the vertical definition emphasises the operational role of the various parties involved such as governments, legal and regulatory institutions and enterprises. It focuses on infrastructure (such as telecommunication), messages that are exchanged,

<sup>141</sup> Ibid 13.

<sup>142</sup> Ibid 15.

basic and sectoral rules governing the transactions and applications (such as websites).<sup>143</sup> This is described in the figure below.

**Figure 2.7 UNCTAD Vertical Description of Electronic Commerce**



Source: UNCTAD<sup>144</sup>

These definitions rely on the medium upon which transactions take place in defining several transactions including consumer transaction. One can gather from these definitions that e-commerce is a commercial activity involving the acquisition of goods and services through electronic means. Much like traditional commerce, there is an exchange of goods and services, but instead of taking place at the physical location of the store, it is conducted online and makes use of technologies such as electronic data interchange, email, electronic fund transfers or smart cards to receive payments and keep track of transactions.<sup>145</sup>

<sup>143</sup> Ibid.

<sup>144</sup> Ibid.

<sup>145</sup> Michael S H Heng, 'Understanding Electronic Commerce from a Historical Perspective' (2003) 12 *Communications of the Association for Information Systems*, 104  
<<http://aisel.aisnet.org/cais/vol12/iss1/6/>>.

It is also evident that e-commerce is growing every day, both in form and shape. The discussion in this thesis highlights the shape that e-commerce has taken in Tanzania and its unique features. As mentioned earlier, Tanzanian e-commerce is integrated with m-commerce and this will be taken into consideration when referring to Tanzanian e-commerce.

### ***Types of e-commerce***

E-commerce can be classified in different ways according to the transactions and those who are involved: these are as follow:

#### **Business to business e-commerce (B2B)**

B2B e-commerce are transactions conducted electronically between businesses over the internet, extranets, intranets, or private networks.<sup>146</sup> This transaction may be conducted between a business and its supply chain members, as well as between a business and any other business.<sup>147</sup>

In B2B transactions both the buyer and seller are businesses. A good example of B2B e-commerce is the supply or distribution chain management by manufacturing companies (eg purchase manager of the manufacturing company placing orders to suppliers or a sales manager transferring finished goods to dealers). The transactions are high in value and low in volume. The payment method is generally bank to bank money transfer.<sup>148</sup>

It is argued that e-commerce B2B transactions have dominated e-commerce; more often carried out through EDI,<sup>149</sup> company websites, B2B hubs and e-procurement systems.<sup>150</sup>

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<sup>146</sup> Murray E Jennex and Don Amoroso, 'E-Commerce Infrastructure Success Factors for Small Companies in Developing Economies' (2004) 4 *Electronic Commerce Research* 263, 264.

<sup>147</sup> Ibid.

<sup>148</sup> Michael J Shaw, 'Electronic Commerce: Review of Critical Research Issues' (1999) 1 *Information Systems Frontiers* 95.

<sup>149</sup> OECD, above n 2, 17; for the definition of EDI please refer to Figure 2.6.

<sup>150</sup> Conan C Albrecht et al, 'Marketplace and Technology Standards for B2B e-commerce: Progress, Challenges' (2005) 42 *Information & Management* 865, 865  
<<http://dl.acm.org/citation.cfm?id=2389382&CFID=377531789&CFTOKEN=30020155>>.

When engaging in e-commerce, SMEs, especially those in developing countries such as Tanzania may find themselves facing several concerns. The majority of the SMEs in developing countries have to deal with more than a single party in one transaction.<sup>151</sup> Research published by UNCTAD revealed that a typical international trade transaction involves more than twelve different parties.<sup>152</sup> This creates a major challenge in e-commerce where SMEs have to deal with all these parties electronically. This is even further complicated where there are no laws to enable SMEs to engage in electronic transactions or protect them when they are placed in a compromised position. There is an assumption that in B2B transactions, there is equal bargaining power between the parties.<sup>153</sup> However, this is not the case. There is no doubt that SMEs from Tanzania who are dealing with a number of businesses both from developed and developing countries will not have equal power to bargain, or possess sufficient information on the transactions they enter into.<sup>154</sup>

Similar unequal bargaining powers exist among SMEs in other countries, including developed countries. As a result, initiatives have been taken to protect SMEs engaging in B2B transactions.<sup>155</sup> It is essential that countries, in particular Tanzania, address the concerns facing SMEs when engaging in B2B electronic transactions.

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<sup>151</sup> UNCTAD, 'E- Commerce and LCDs Challenge for Enterprises and Governments' (Paper presented at E-commerce and LCDs Round Table, Kathmandu Nepal, 30-31 May 2000) 8.

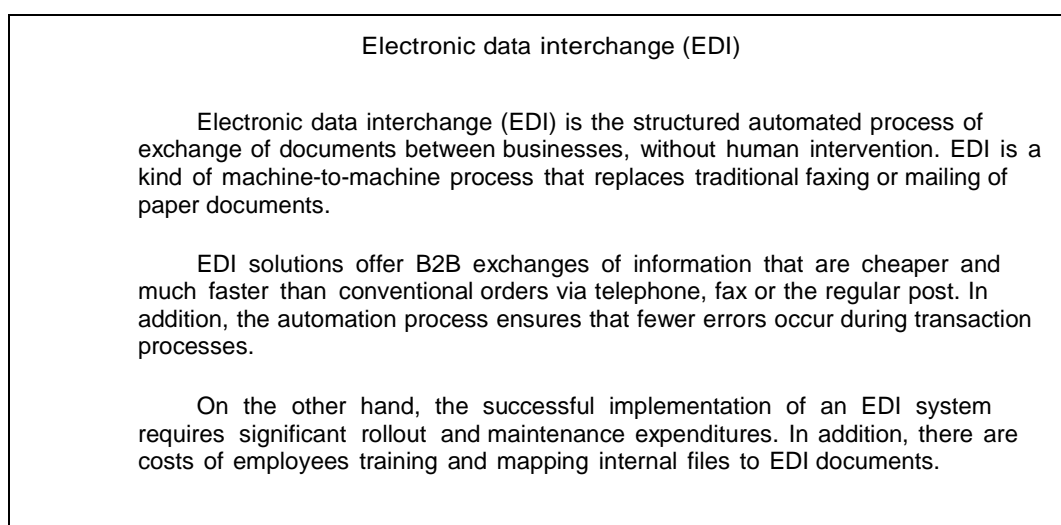
<sup>152</sup> Ibid.

<sup>153</sup> Cristina Coteanu, above n 126, 7.

<sup>154</sup> Refer to the characteristics of Tanzania SMEs on The SMEs Definition subsection above.

<sup>155</sup> Such as in Australia and New Zealand. See Freilich and Griggs, above n 105; Luke Nottage et al, 'Comparative Consumer Law Reform and Economic Integration' in Justin Malbon and Luke Nottage (eds), *Consumer Law and Policy in Australia and New Zealand* (Federation Press, 2013).

**Figure 2.8 The Definition of EDI**



Source: OECD<sup>156</sup>

### 2.3 PROTECTION IN THE NEW ERA: A NEW CONSUMER PARADIGM

There is no doubt that e-commerce calls for the birth of a new consumer protection era in Tanzania. It has been argued that, ‘in the midst of the social turmoil created by rapid technological innovation in consumer products and consumer marketing channels, support for a third wave of innovation in consumer protection laws may be emerging.’<sup>157</sup>

This contention can easily be supported by the current state of e-commerce. As stated in the discussion above, new issues that have not been present before have arisen.<sup>158</sup> These necessitate new initiatives and new measures in addressing them. Consumers in this era are no longer in a position to ‘candle the eggs’.<sup>159</sup> This situation does not only face Tanzania, but most parts of the world.<sup>160</sup> The internet has changed traditional methods of business, bringing new risks and consequences, especially in e-commerce

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<sup>156</sup> OECD, above n 2, 18.

<sup>157</sup> Jane K Winn, ‘What Protection Do Consumers Require in the Information Economy?’ in Jennifer Gunning et al (eds), *Ethics, Law & Society* (Ashgate, 2009) 308.

<sup>158</sup> Harland, above n 84, 6-8.

<sup>159</sup> Candling the egg is a method involving candle light to determine the quality of the eggs. See Silber, above n 12. The current advance in technology makes candling the egg an outdated measure that is no longer sufficient at protecting consumers. Further protection is needed for online transactions.

<sup>160</sup> Silber, above n 12, 15.

transactions.<sup>161</sup> The change of scenery in the online consumer transactional arena, where the old concerns and basis for consumer protection have taken a different shape, raises the need for new and extensive measures for consumer protection.<sup>162</sup>

This new situation can be further elaborated through features and characteristics of electronic commerce. One example of this is in the case of information asymmetry. The need of consumer protection for information asymmetry has taken a different face in the online arena as the information asymmetry problem presents itself in different ways in the online environment.

The problem of information asymmetry can be seen through the accessibility and availability of the information itself. Whereas in offline transactions there is a need to ensure that offline consumers are provided with enough information so that they can make an informed choice,<sup>163</sup> this has a different effect in the online world where there is an overflow of information due to the nature of the internet.<sup>164</sup> E-consumers are provided with too much information that is likely to confuse, mislead and even discourage them from using the information provided.<sup>165</sup> Moreover, the cost of such information disclosure is so high that it outweighs the benefits. Consequently, such disclosure requirements from the law may paralyse the consumer instead of resolving any problems.<sup>166</sup> Hence there is a need for a different approach when tackling e-consumer information issues. E-consumers are faced with the danger of information overload. Clearly, the massive availability of information in the online environment does not resolve the issue of information asymmetry but instead creates a problem of its own.<sup>167</sup>

The new concerns of information asymmetry through the accessibility and availability

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<sup>161</sup> Rolf H Weber, *Regulatory Models for the Online World* (Kluwer Law International, 2002) 41-2; Silber, above n 12, 25; Harland, above n 84, 7-8.

<sup>162</sup> Harland, above n 84, 7-8.

<sup>163</sup> Coteanu, above n 126, 18.

<sup>164</sup> Yu-Chen Chen, Rong-An Shang and Chen-Yu Kao, 'The Effects of Information Overload on Consumers' Subjective State Towards Buying Decision in the Internet Shopping Environment' (2009) 8 *Electronic Commerce Research and Applications*, 48  
<<http://www.sciencedirect.com/science/article/pii/S1567422308000367>>.

<sup>165</sup> Ibid.

<sup>166</sup> See Anthony Duggan, 'Consumer Credit Redux' (2010) 60 *University of Toronto Law Journal* 687, 694.

<sup>167</sup> Edward Rubin, 'The Internet, Consumer Protection and Practical Knowledge' in Jane K Winn (ed), *Consumer Protection in the Age of the "Information Economy"* (Ashgate, 2006) 47.



of information not only involves risks of information overload, but carry other risks due to factors such as information design, information updates, and information ownership. For instance, risks in information designs may occur in the online environment where information is posted on a website for e-consumers to access, but is presented in complex features that are likely to confuse the e-consumer.<sup>168</sup> It is easy to be confused by information meant for advertisements and key information on products and services offered.<sup>169</sup> This raises the need for businesses to represent information in a clear manner that allows e-consumers to differentiate advertisements from other substantive information.

Similarly, risks arise when information offered to e-consumers is not updated or where it is not clear who owns the information. This may occur where information on past offers is not updated and e-consumers are led to believe that the advertisements are still valid, or where hyperlinks to other popular businesses or brand names are used where e-consumers may be led to believe there is an association between the businesses, necessitating the need for regulation of information presented online to ensure that e-consumers receive the correct information, in a suitable format, at the right time so as to make well informed decisions.

The problems of information asymmetry can also be seen through cross border transactions which have become magnified due to the borderless nature of online transactions.<sup>170</sup> As a result, the problem of information asymmetry exists not only between businesses and e-consumers, but includes other categories such as developed and developing countries; the rich and the poor.<sup>171</sup>

Businesses in developed and developing countries may be dealing with the same products or services, but those in developed countries are in a better position as far as information is concerned. Businesses in developing countries, which mainly rely on imports of goods or services from developed countries, are more likely to be experience information asymmetry compared with their counterparts in the developed

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<sup>168</sup> Coteanu, above n 126, 115.

<sup>169</sup> Ibid.

<sup>170</sup> Iain Ramsay, 'Consumer Protection in Less-Developed Countries: The Latin American Experience' in Iain Ramsay (ed), *Consumer Law in the Global Economy* (Ashgate, 1996) 50, 51.

<sup>171</sup> Ibid.

world. Consequently, initiatives addressing this problem need to reflect this asymmetrical position.

Moreover, information asymmetry can also exist between businesses within a local jurisdiction. For instance, businesses in big cities and towns in Tanzania have better access to information than their counterparts in rural areas; the same is true with e-consumers in cities versus rural areas. It is evident that there is inequality in information access that is caused by poor economic position.<sup>172</sup> This unequal status in electronic transactions is reflected in the information capitalism phenomenon which has emerged with development of technology and globalisation.<sup>173</sup>

### Consumer to consumer e-commerce (C2C)

The problem of information asymmetry can further be seen through consumer to consumer electronic transactions (C2C e-transactions). In online C2C e-transactions both parties are e-consumers. In these transactions, e-consumer sellers may not be as well informed as pure e-sellers. This creates vulnerability for both parties that needs to be considered when enacting initiatives to address electronic consumer protection.<sup>174</sup>

C2C e-transactions raise a wide range of issues that have not been foreseen. There is a 'blurring of the lines between producers and consumers in the production of information products; and the relationship between information privacy and autonomy for consumers; - these denotes new changes.'<sup>175</sup> These concerns need to be addressed so as to safeguard e-consumers welfare.

Apart from these new concerns facing e-consumers in information asymmetry, there are also different concerns that e-consumers face such as new ways of payments (eg mobile money payments), and new ways of delivery (such as electronic delivery). E-consumers are exposed to different kinds of fraudulent actions and threats to their

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<sup>172</sup> Ibid 51-3.

<sup>173</sup> Ibid 51.

<sup>174</sup> The problems arising in C2C e-transactions is discussed in Chapter Three.

<sup>175</sup> Winn, above n 155.

privacy.<sup>176</sup>

As pointed out at the beginning of this discussion, the new trend has left e-consumers in a more vulnerable position than their counterparts who shop offline. As a result, one can argue that the rights of e-consumers and general consumers are equal in theory, but are different in practice and enjoyment.<sup>177</sup>

It can further be asserted that the principles of ‘functional neutrality’ and ‘functional equivalent’ embodied in some e-commerce initiatives such as the *UNCITRAL Model Law on Electronic Commerce* of 1996,<sup>178</sup> stating that offline and online transactions should be treated equally by the law and that the law should not discriminate between different forms of technology, is not only impractical when it comes to real life practice, but hinders the effective protection of e-consumers. The principles of ‘functional neutrality’ and ‘functional equivalent’ still reflect an important point with regard to online and offline transactions. For instance, it is essential to ensure that ‘a document would not be denied legal effect, validity or enforceability solely on the grounds that it is in electronic form.’<sup>179</sup> However, it is not realistic to accommodate any e-transaction developments without further legislative work.

It is evident that the concerns that e-consumers face while transacting online need to be addressed; more so in a country like Tanzania. This is due to two major reasons; the first being that the nature and characteristics of e-commerce in Tanzania are unique, and are much influenced by its social, economic and cultural context. Hence, the concerns arising in these transactions are more separable and distinct from the concerns offline consumers face. The second reason is the general state of consumer protection in Tanzania; which is unsatisfactory and hence will not be effective if the same measures are applied online.

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<sup>176</sup> For further discussion on characteristics and problems arising in online transactions please refer to Chapter Three.

<sup>177</sup> Shashi Nath Mandal, ‘Protection of E-Consumers in Electronic Transactions’ (2011) 1(4) *The IUP Law Review* 59.

<sup>178</sup> UNCITRAL, *UNCITRAL Model Law on Electronic Commerce with Guide to Enactment 1996 with additional article 5 bis as adopted in 1998* (United Nations, 1999)

<[http://www.uncitral.org/uncitral/en/uncitral\\_texts/electronic\\_commerce/1996Model.html](http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/1996Model.html)>.

<sup>179</sup> Ibid.

However, initiatives addressing e-consumer concerns need to be approached with an open mind; where available, initiatives should be taken into consideration and adapted to fit the needs of the targeted group.

One way of achieving this approach is through analysing all initiatives regardless of jurisdiction and status (common law, binding authorities and guidelines). This is because e-commerce incorporates one global market reaching all jurisdictions. Just as the global nature of the internet invites a legal framework on a global level,<sup>180</sup> the global nature of e-commerce requires taking into account initiatives from other jurisdictions in tackling local e-commerce issues. Moreover, e-consumer protection initiatives are new and the area has not been thoroughly exhausted; consideration of all available measures should be undertaken.

However, time and space mean that such a comprehensive study is not possible in this thesis. It is for this reason that this study examines a selection of different laws regardless of whether they are considered a binding authority for Tanzania; treaties, guidelines, directives and other initiatives will be used for analysis in this work. Also, authorities that are not based in common law may also be used. This is done, keeping in mind the substance and core values of Tanzanian e-consumers, and the intentions of the thesis.

There are questions that need to be answered to set a clear path for further discussion in this thesis. This will assist not only in having a focused discussion, but also a clear and understandable scope of the thesis. Among the questions that will be highlighted is why protect the consumers, who should be protected, and how should they be protected?

### **2.3.1 *Why protect e-consumers***

It is necessary to address the reasons behind the need for e-consumer protection given the new characteristics and features that e-consumers face in electronic transactions. Whereas the need for e-consumer protection may not be completely different from

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<sup>180</sup> Weber, above n 159, 61.

those of the general consumer; the same may not be said for C2C e-consumers. There is minimal protection as far as C2C transactions are concerned; however, the current issues occurring in C2C transactions necessitate a need for a change in this approach. It is vital to point out why there is a need to protect e-consumers engaging in C2C transactions and the reasons for a need of a different approach when dealing with C2C transactions. The discussion below will highlight the current situation and the need to address C2C e-consumers protection. The importance and reasons of protecting consumers in general will also be highlighted so as to form the basis for discussion on C2C e-consumer protection.

Whereas there are a number of advocates who call for consumer protection, the whole question of consumer protection has been faced with criticism and arguments as to whether consumer protection regulations are necessary. It is argued that advocates for traditional freedom of contract and for strong consumer protections can each claim an ethical justification of their position.<sup>181</sup>

Among the arguments against consumer protection regulations is that ‘many consumer protection laws backfire and produce unintended results; are incapable of resolving problems they were intended to address and most often fuelled by a political critique often sustained by agents of affected commercial groups.’<sup>182</sup> Among the counter arguments for this is that ‘strong consumer protection laws protect parties incapable of protecting themselves from those who seek to make unfair use of their greater market power.’<sup>183</sup> Discussion on these arguments can be extensive, however, it will not be carried out further as the intention of this part is to highlight the importance of e-consumer protection in Tanzania.

It is argued that there is a high degree of imperfection in today’s market.<sup>184</sup> For example, even in a situation where information on quality and cost of goods and

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<sup>181</sup> Winn, above n 155.

<sup>182</sup> Silber, above n 12, 22; Robert H Lande, ‘Proving the Obvious: The Antitrust Laws Were Passed to Protect Consumers (Not Just to Increase Efficiency)’ (1999) 50 *Hastings Law Journal*, 959 <[http://heinonline.org/HOL/Page?handle=hein.journals/hastlj50&div=37&g\\_sent=1&collection=journals](http://heinonline.org/HOL/Page?handle=hein.journals/hastlj50&div=37&g_sent=1&collection=journals)>.

<sup>183</sup> Winn, above n 155.

<sup>184</sup> Ringo Tenga, ‘Consumer Protection in Tanzania: Challenges and Prospects for the National Consumer Advocacy Council (NCAC)’ (Paper presented at the Fair Competition Commission’s Consumer Councils Induction Workshop, Morogoro, 25 April 2008) 1.

services is available to all players, sellers often employ other tactics to keep prices high.<sup>185</sup> Without authoritative intervention, consumer welfare is at risk.

One thing that is clear with consumer protection in Tanzania is that it is unsatisfactory and the consumers are rendered helpless.<sup>186</sup> Whereas the internet marks a technical development and an advance in commercial transactions, ‘neither the internet nor other avenues of electronic commerce have narrowed the imbalance between sellers and buyers;’<sup>187</sup> on the contrary, the situation has made them more vulnerable.<sup>188</sup> The advance of technology leaves e-consumers in Tanzania in a more exposed situation with little protection. The situation is further exacerbated by the fact that traditional principles of contract law are ineffective in protecting e-consumers.<sup>189</sup> This may be due to various factors such as access and affordability of pursuing available measures; for both e-consumers and consumers in general.<sup>190</sup>

A particular emphasis in e-consumer protection needs to be given to C2C e-consumers. Traditionally, consumers engaging in C2C transactions were considered to be in a better position to oversee their own welfare.<sup>191</sup> In these transactions consumers are seen as ‘responsible for their actions and are free to enter into “bad” deals including contracts that take away their rights....’<sup>192</sup> However, the current position that C2C consumers find themselves in is too complex to be ignored. C2C e-consumers in Tanzania, and around the world, are faced with challenges that can only be solved through specific initiatives.

Electronic C2C transactions have advanced in different forms and ways. The media through which C2C transactions take place have also advanced. Consequently, non-transactional arenas have been involved in electronic consumer transactions, ranging

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<sup>185</sup> Ibid.

<sup>186</sup> Please refer to Chapter Three.

<sup>187</sup> Norman Silber “From the Jungle to the Matrix: the Future of Consumer Protection in Light of its Past” in Jane K. Winn (ed), *Consumer Protection in the Age of the 'Information Economy'*, Ashgate Publishing Ltd, Burlington, USA, November 2006, 29.

<sup>188</sup> Ibid.

<sup>189</sup> Tenga, above n 182.

<sup>190</sup> Ibid.

<sup>191</sup> There has been an exclusion of C2C transactions such as those in auctions by several available initiatives.

<sup>192</sup> Mark E Budnitz, ‘The Federalization and Privatization of Public Consumer Protection Law in the United States: Their Effect on Litigation and Enforcement’ (2012) 24 *Georgia State University Law Review* 663, 663.

from social networks to blogs and other non-commercial websites.<sup>193</sup> These social networks and forums have been convenient for not only discussion, news and information sharing but also for fostering e-commerce. The online social networks offer a more affordable and easily accessible arena for online sales.

Most of these social networks are unregulated. A few are self-regulated or controlled by moderators, but the moderators or the regulations provided are limited to controlling offensive posts in a particular network so as to avoid misunderstandings among the users of such networks. In cases of dispute or fraud in these networks, users are rendered helpless. Social network controllers have few obligations to the consumers who buy from their sites.

The current situation in e-commerce through social media and forums reveals a new trend which not only shows a change in the characteristics and nature of C2C transactions but also shows the changing roles of the consumers involved. The characteristics of C2C transactions have changed with the rise of social media. Traditional C2C transactions such as those in auction sites like eBay, controlled by moderators and forum providers, have been surpassed by social networks and forums. These social networks and forums come with different characteristics. For instance, instead of only hosting businesses, they provide businesses with the opportunity to directly reach the consumers in social networks and forums. This creates a new features where sellers do not have to trade or reach out for customers from their own venues, but can access consumers via a third party venue, in most cases a third party trusted by the consumer.

There are different ways that businesses reach out for consumers in such networks including becoming members of the networks and social friends. Hence, in some cases, they seek to get close and personal with the consumers, and employ marketing strategies that consumers are unaware of. Consumers are left with the sense of friendship and belonging to such business, more often being required to 'like' these new friends. Such actions do not only affect the consumer, but also have a major

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<sup>193</sup> Ecommerce Junkie, *Data Confirms that Social Networking Users Spend More Online* (9 June 2010) *Ecommerce Junkie* <<http://ecommercejunkie.com/2010/06/09/data-confirms-that-social-networking-users-spend-more-online/>>.

influence to consumers' friends in the forums.

Moreover, social media and forums have created an opportunity where consumers are able to run and control sales in their own consumer-owned forums. Consumers play big roles in social networking and e-commerce forums, including being sellers and endorsers of products and services offered in such media. Some own blogs and similar forums where they have friends, family and other consumers following their posts and buying products offered in their blogs. Big companies and businesses sponsor some of these social networks. Such sponsorship endorses and creates authenticity among forum users.<sup>194</sup>

Consumers have a powerful role in such transactions due to the social relations created in such social media and forums. They have the power to influence, recommend, reprimand, sustain and secure a social transaction.

The ability of consumers to influence in online social network and forums revolves around the social capital theory. The OECD defines social capital as the 'networks together with shared norms, values and understandings that facilitate co-operation within or among groups.'<sup>195</sup> With social capital, there is greater interaction within a certain network which generates a sense of community spirit. There is trust and a sense of belonging.

Consumers involved in transactions through online social networks and forums can offer security and fraud checks on the items and goods offered as forums members scrutinise the posts, determine the fairness of the price and are even able to identify sham and counterfeit goods. This is influenced by their level of knowledge of the products and service offered and their personal experiences.

As a result of all these the roles of consumers have changed. The consumers in these online social networks and forums have become advertisers, as they offer marketing information and reviews on the products they support and also on the products they

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<sup>194</sup> This is much influenced by the theory of social capital, see below.

<sup>195</sup> OECD, *OECD Insights: Human Capital* (25 February 2007)  
<<http://www.oecd.org/insights/37966934.pdf>>.



sell in such networks and forums.

They are not only advertisers but have also become hosts of commercial advertising sites. As their blogs and social forums become popular, they attract businesses and commercial advertisers who use their blogs and forums for advertising purposes through sponsorship or other means.

Furthermore, consumers have become content producers, as they post different content and information on their sites to support their views or the views of the businesses they support. More often the content produced is through a third source. It is possible for such content to have little or no authentication and may even include hearsay. Consumers have also become content regulators as they regulate posts and product information for sale that others can access through their network or forum; choosing what is to be published and what is to be blocked in their forums.

These trends have also made the consumers into intermediaries. They are payment intermediaries as they facilitate payments on the items sold in their blogs or social networks; information intermediaries as they facilitate information for their forum members; and sales intermediaries as they facilitate sales via their blogs and forums.

Apart from these major consumer roles in social networks and forums, there is also a large business involvement which raises risk for the members. These risks arise from business practices as well as the consumers who support the businesses.

As businesses become involved in the social networks and forums, they market their products and services, enter into selling contracts with the network and forum members. They disseminate information to members, they contact and keep in touch with members and they make promises and expectation to members regarding their products and services.

Consequently, there is less control and security of information in blogs and social forums. There is a new element of misleading conduct in these transactions where

misleading conduct can be undertaken by a third party.<sup>196</sup> A unique aspect of misleading conduct in social network platforms and blogs can occur through users contributing information through posts and comments, grading and providing other forms of endorsement on information posted by others. Most of these become trusted sources by network members even though they may not be true. Sometimes the commentators are paid by businesses to endorse their products.

New payment concerns also arise in these transactions where, in some of social networks and forums, consumers are offered virtual credits and currency which have to be claimed by real money.<sup>197</sup> This is a business model practice, which raises consumer protection concerns such as fair exchange of currencies, a lack of consumer knowledge regarding such exchanges, unauthorised payments, fraud and security issues and how to resolve disputes arising from these exchanges. The major key players are the service providers of such currencies. Consequently there is an imbalance in bargaining power that needs to be addressed to protect consumers.

Another unique aspect that arises in these transactions is the involvement of business. Consumers are faced with the challenge of business involvement in C2C transactions. As pointed out above, as online social networks and forums become popular, they attract businesses. There is greater trust among online social platform users, as in most cases they involve a network of friends. There is a sharing via word of mouth on products and services offered, and therefore easy endorsement and acceptance of such products and services. But this changes when business becomes involved, it does not continue to be a C2C transaction but rather B2C transaction.

It may be difficult for consumers to assess whether they are dealing with individual sellers or businesses (C2C transactions or B2C transactions), and hence not know the proper actions to be taken in case of dissatisfactory service.

Moreover, consumers are faced with enticement and pressure from businesses

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<sup>196</sup> *Australian Competition and Consumer Commission v Allergy Pathway Pty Ltd* (No 2) [2011] FCA 74.

<sup>197</sup> Facebook, *Facebook Help Centre* (27 May 2013) <<http://www.facebook.com/help/178782558921789/>>; Sutter, John D, ““Virtual Currencies” Power Social Networks, Online Games’, *CNN* (online), 19 May 2009 <<http://edition.cnn.com/2009/TECH/05/19/online.currency/index.html?iref=allsearch>>.

engaging in social media and networks. Consumers are often required to show support of these businesses in various forms such as ‘liking’ the business, ‘following’ them or becoming social members of their business. This is often encouraged by promotion and discount offers, or free virtual credits of the hosting network. Whereas this may be a harmless practice, there is the risk of abuse by powerful businesses, especially where no consumer protection is offered. This not only places individual consumers at risk but also the future of e-commerce in C2C transactions.

Most of these characteristics and features seen in C2C transactions carried out in social media and network forums did not previously exist; and they raise challenges that cannot be left for e-consumers to resolve. C2C transactions are more advanced and complex than previously seen; the importance of addressing and protecting consumers in C2C transactions cannot be overemphasised.

It is clear that there is a lack of specific regulations or laws addressing e-consumer protection in C2C electronic transactions such as those on social media and social networks at both an international and national legal level. There are countries that address concerns arising through social media through the available laws.<sup>198</sup> This causes inconsistency in decisions,<sup>199</sup> uncertainty and leaves regulatory gaps as many concerns arising in social media and networks are recent and require specific regulatory direction. Moreover, this marginal alternative will only work in jurisdictions where there is a working consumer protection system or reliable traditional regulations.

There is a growing realisation that it is time e-consumers transacting in C2C transactions are protected. This is reflected through several initiatives such as the OECD ‘Conference on Empowering E-consumers: Strengthening Consumer Protection in the Internet Economy’, which reviewed the ten years after enactment of the *OECD Guidelines for Consumer Protection in the Context of Electronic*

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<sup>198</sup> For example, in the case of *Australian Competition and Consumer Commission v Allergy Pathway Pty Ltd (No 2)* [2011] FCA 74.

<sup>199</sup> *Australian Competition and Consumer Commission v Allergy Pathway Pty Ltd (No 2)* [2011] FCA 74; *Tamiz Payam v Google Inc* [2013] 1 WLR 2151; *Metropolitan International Schools Ltd v Design Technica Corp* [2011] 1 WLR 1743; *Trkulja v Google Inc LLC (No 5)* [2012] VSC 533 (12 November 2012).

*Commerce 1999*.<sup>200</sup> During the conference, emerging challenges in consumer protection were raised with a view towards identifying where consumer protection may need to be strengthened or changed. It was noted that there is a need to address new trends and issues arising in B2C consumer transactions and issues arising from C2C transactions.<sup>201</sup> Among the areas needing further attention in B2C transactions were fraud, payment security, privacy, behavioural advertising and personal data protection and redress.<sup>202</sup>

It was also noted that several issues are arising in C2C transactions as consumers are increasingly using the internet as a means to sell goods and services.<sup>203</sup> It was noted that a number of C2C online platforms have developed over the past decade, where C2C consumers sell goods and services, through their e-mails, social networking sites, personal websites, and auction sites.<sup>204</sup> As a result, a number of new e-consumer protection concerns have emerged.<sup>205</sup>

It was noted that among concerns in C2C transactions include:

... the question of trust among sellers, buyers, and the organisation facilitating transactions; the responsibilities and legal obligations of individuals involved in C2C transactions and of the intermediaries that provide trading platforms. ... issues related to the role and responsibilities of Internet intermediaries to consumers include information disclosures and fraudulent activities such as cyber fraud and counterfeiting;... fraud;... digital content products;...participative web panel; ...privacy; ...accountability; ... and redress...<sup>206</sup>

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<sup>200</sup> OECD, 'Conference on Empowering E-consumers: Strengthening Consumer Protection in the Internet Economy' (Background Report, OECD, 8-10 December 2009) <<http://www.oecd.org/ict/econsumerconference/44047583.pdf>>.

<sup>201</sup> Ibid.

<sup>202</sup> Ibid 18-21; Brigitte Acoca, 'Conference on Empowering E-consumers: Strengthening Consumer Protection in the Internet Economy: Summary of Key Points and Conclusions' (OECD, April 2010) <<http://www.oecd.org/sti/ieconomy/45061590.pdf>> <<http://www.oecd.org/sti/ieconomy/45061590.pdf>>2-4.

<sup>203</sup> OECD, above n 198, 22.

<sup>204</sup> Ibid.

<sup>205</sup> Ibid 18-23; Acoca, above n 200, 3-5.

<sup>206</sup> OECD, above n 198, 23-30.

It was noted during the discussion that the ‘distinctions between consumers and sellers, and commercial and non-commercial online activities, have blurred.’<sup>207</sup> Consequently, ‘consumers may have difficulty determining whether the party to a transaction is a professional seller, or not. As a result, the applicability of consumer-specific protection laws (traditionally applied to B2C transactions only) is becoming unclear in the C2C context.’<sup>208</sup>

It was concluded that defining the consumer protections that are needed in C2C transactions was an essential step to enhance consumer protection in C2C transactions.

It was suggested that an analytical report be prepared on C2C and perhaps C2B transactions which would help to identify the forms C2C is taking online and examine how it would most likely evolve in the future.<sup>209</sup>

Similarly, in a report by the staff of the US FTC,<sup>210</sup> it was clearly pointed out that the role of consumers is changing as they engage in C2C transactions.<sup>211</sup> Similarly, new trends arise in both B2C transactions and C2C transactions. This raises the need to adopt consumer protection strategies to ensure that all consumers, including the vulnerable, are equally well served. It was noted that ‘effective consumer protection is more important and more relevant than ever.’<sup>212</sup>

This gives hope that the problem is now out in the open and hence measures to address such problems will soon follow.

Other efforts worth noting are from UNCITRAL, which is currently working on online dispute resolution (ODR) designed to address B2C and C2C transactions. These efforts started in 2010 under the United Nations Working Group for Online Dispute Resolution (ODR) of Cross-Border Electronic Commerce Transactions

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<sup>207</sup> Acoca, above n 200, 5.

<sup>208</sup> Ibid.

<sup>209</sup> Ibid.

<sup>210</sup> Federal Trade Commission, *Protecting Consumers in the Next Tech-ade: A Report by the Staff of the Federal Trade Commission* (March 2008) <<http://www.ftc.gov/os/2008/03/P064101tech.pdf>>.

<sup>211</sup> Ibid.

<sup>212</sup> Ibid.

(UNCITRAL Working Group III).<sup>213</sup> Progress on these rules is a positive step towards providing access to justice for e-consumers in cases of grievance.

This recognition of the need of protecting consumers in C2C transactions not only solidifies the need for protection of C2C e-consumers but e-consumers in general. There is a need for deliberate action at both a national and international level to address these issues. In particular, there is a need to address C2C consumer protection in Tanzania.

### **2.3.2 Who should be protected?**

One question that needs to be asked is, who should be protected? This question goes beyond the scope of who is the consumer and rather address the extent of violations, imbalances, bargaining power and position within the transaction itself.<sup>214</sup>

Both the e-consumer and e-consumer seller are vulnerable when engaged in C2C transactions. Therefore, it should be in the interests of the regulators to come up with initiatives that will ensure that e-consumer seller rights are also safeguarded, especially against the businesses that get involved in C2C transactions.

Similarly, the need to safeguard the interests of SMEs in electronic transactions is also important; to ensure that SMEs are protected when they deal with big businesses in online transactions. This is particularly so in Tanzania where there is a huge difference between SMEs and big businesses; with the SMEs being family businesses with little capital. The majority of the SMEs in Tanzania are family businesses engaging up to four family members.<sup>215</sup>

The basis of providing protection to consumers may be used to consider the basis of SMEs protection in Tanzania. The assumption that SMEs are equal and free when

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<sup>213</sup> The ODR framework includes procedural rules, substantive rules, standards for ODR providers and an enforcement protocol. However the current work is on procedural rules.

<sup>214</sup> For the discussion on who is a consumer see definition of key concepts above.

<sup>215</sup> Tanzania Chamber Of Commerce, above n 118; The United Republic of Tanzania, Ministry of Industry and Trade, above n 111.

they transact with other businesses is no longer valid. Tanzania SMEs engaging in e-commerce not only have to deal with large business in the country but giant businesses across borders. Consequently, they are equally vulnerable as inexperienced consumers. Moreover, Tanzania consumers are likely to suffer from the ‘domino effect’ as a result of the SMEs treatment; violations that SMEs faces are likely to be passed on to the consumers who are next in line to receive the goods and services in question.

The vulnerability of SMEs is complicated further in Tanzania where they are faced with a number of local challenges.<sup>216</sup> Such challenges include, competing with foreign SMEs investing in the country with little regulation or legal guidance. Furthermore, studies have revealed that SMEs in Tanzania are characterised by constant tension and feuds between small traders and urban authorities.<sup>217</sup> This situation is likely to place SMEs in a more vulnerable state.

The discussion regarding protection of SMEs has been carried out in other jurisdictions. An example of this is the EU discussion around the proposal to introduce the Common European Sales Law (CESL).<sup>218</sup> It is recommended the law apply to B2B transactions in circumstances where one party is an SME.<sup>219</sup>

These efforts recognise the burden that SMEs face when dealing with large businesses within the EU; it was expressed in the Explanatory Memorandum of the CESL that:

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<sup>216</sup> ‘Local Small Enterprises Require Legal Protection’ *IPP Media* (online), 31 March 2011 <<http://www.ippmedia.com/frontend/index.php?l=27617>>.

<sup>217</sup> Rashid M Mfaume, and Wilhelm Leonard, ‘Small Business Entrepreneurship in Dar es salaam - Tanzania: Exploring Problems and Prospects for Future Development’ (Paper presented at TIPS(Trade and Industrial Policy Strategies)/DRUP(Development Policy Research Unit)Forum 2004, African Development and Poverty Reduction, The Macro-Micro Linkage, South Africa, 13-15 October 2004) <[www.tips.org.za/files/Small\\_Business\\_Entrepreneurship\\_in\\_Dar-es-salaam\\_rashid\\_mfau.pdf](http://www.tips.org.za/files/Small_Business_Entrepreneurship_in_Dar-es-salaam_rashid_mfau.pdf)>.

<sup>218</sup> This law was proposed on 11 October 2011 by the European Commission to facilitate cross border trade through a single set of rules for cross border contracts and a high level of consumer protection across all Member States. See European Commission, ‘European Commission Proposes an Optional Common European Sales Law to Boost Trade and Expand Consumer Choice’ (Press Release, IP/11/1175, 11 October 2011) <[http://europa.eu/rapid/press-release\\_IP-11-1175\\_en.htm](http://europa.eu/rapid/press-release_IP-11-1175_en.htm)>; European Commission, *An Optional Common European Sales Law: Frequently Asked Questions* (MEMO/11/680, 11 October 2011) <[http://europa.eu/rapid/press-release\\_MEMO-11-680\\_en.htm?locale=en](http://europa.eu/rapid/press-release_MEMO-11-680_en.htm?locale=en)>.

<sup>219</sup> European Commission, *Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law* (COM(2011) 635 final, 2011/0284 (COD), 11 October 2011), art 7 <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0635:FIN:en:PDF>> .

The costs resulting from dealings with various national laws are burdensome particularly for SME. In their relations with larger companies, SME generally have to agree to apply the law of their business partner ... For both types of contracts (business-to-business and business-to-consumer) for SME, these additional transaction costs may even be disproportionate to the value of the transaction... SME are particularly disadvantaged...<sup>220</sup>

It is noted that CESL is still in its proposal stage and is yet to be adopted into law,<sup>221</sup> but the principles embodied in it highlight the SME position within different jurisdictions.

The SME situation reflected through the EU is similar to that faced by SMEs in Tanzania, supporting the need for consumer protection initiatives in Tanzania to be wide enough to safeguard the interests of SMEs.

A similar discussion to that of the EU was carried out in Australia during reform of their consumer laws.<sup>222</sup> It was decided that the scope of 'unfair contract terms' provisions should be extended to 'standard form contracts' entered into by businesses, including small businesses, and not be confined to individual consumers.<sup>223</sup>

The initiatives taken in Australian were a motivating factor for its neighbouring state of New Zealand where the government called for a revision of its consumer protection laws with the view to follow the Australian initiatives, regarding SMEs and consumer protection against unfair contractual terms, among other measures.<sup>224</sup>

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<sup>220</sup> Ibid 3.

<sup>221</sup> See Eric Clive, 'European Parliament Adopts Proposal for a Common European Sales Law', *European Private Law News* (online), 26 February 2014 <<http://www.epln.law.ed.ac.uk/2014/02/26/european-parliament-adopts-proposal-for-a-common-european-sales-law/>>.

<sup>222</sup> Attorney-General's Department, Commonwealth of Australia, *An Australian Consumer Law: Fair Markets – Confident Consumers* (17 February 2009) <[archive.treasury.gov.au/documents/.../An\\_Australian\\_Consumer\\_Law.pdf](http://archive.treasury.gov.au/documents/.../An_Australian_Consumer_Law.pdf)>.

<sup>223</sup> Ibid.

<sup>224</sup> See New Zealand Ministry of Consumer Affairs, *Consumer Law Reform Bill: Additional Paper – Unfair Contractual Terms* (September 2010) <<http://www.consumeraffairs.govt.nz/pdf-library/legislation-policy-pdfs/CLR-Additional-paper---Unfair-contract-terms.pdf>>; New Zealand Ministry of Consumer Affairs, *Consumer Law Reform: A Discussion Paper* (June 2010) <<http://www.consumeraffairs.govt.nz/pdf-library/legislation-policy-pdfs/consumer-law-review-a-discussion-paper.pdf>>.



It was noted that New Zealand is in a similar position to Australia, as far as consumer protection is concerned, and should therefore take advantage of Australia's extensive examination and analysis on consumer protection laws.<sup>225</sup>

The Australian Productivity Commission (the Commission) considered the justifications for such measures; being economic and ethical reasons that cause consumer detriment.<sup>226</sup> The Commission noted that 'fairness is an ethical value in its own right, and it is a legitimate function of the law to protect consumers from being dealt with unfairly' and that 'there is an economic value in consumers being able to trust suppliers they contract with.'<sup>227</sup> It was further noted that shifting risk on to consumers either between competing suppliers or between suppliers and consumers is not economically efficient.<sup>228</sup> These justifications were sufficient enough to create the need for consumer law revision in New Zealand.

The discussion on SMEs and consumer protection has continued to attract attention and has been carried out on in the World Trade Organisation (WTO) Public Forum 2013.<sup>229</sup> Issues facing consumers and the need for a fair system that will ensure what consumers buy is safe and provide them with access to redress were part of the discussion.<sup>230</sup> A need for dialogue between the WTO and consumers was also highlighted.<sup>231</sup>

It is essential that the concerns that SMEs in Tanzania faces are addressed. There is a need for legal initiatives that will render protection to SMEs while at the same time holding them accountable as sellers, especially when they deal with consumers.

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<sup>225</sup> New Zealand Ministry of Consumer Affairs, *Consumer Law Reform: A Discussion Paper* (June 2010), above n 222, 3-31.

<sup>226</sup> Ibid 31.

<sup>227</sup> Ibid.

<sup>228</sup> Ibid.

<sup>229</sup> The WTO Public Forum is an annual event that provides a platform for public debate across a wide range of WTO issues and trade topics. See WTO, *WTO Public Forum 2013* (1-3 October 2013) <[http://www.wto.org/english/forums\\_e/public\\_forum13\\_e/public\\_forum13\\_e.htm](http://www.wto.org/english/forums_e/public_forum13_e/public_forum13_e.htm)>; WTO, *Day 2 of Public Forum Focuses on Needs of Consumers and Small Businesses* (1-3 October 2013) <[http://www.wto.org/english/news\\_e/news13\\_e/pfor\\_02oct13\\_e.htm](http://www.wto.org/english/news_e/news13_e/pfor_02oct13_e.htm)>.

<sup>230</sup> WTO, *Day 2*, above n 227.

<sup>231</sup> Ibid.

## 2.4 TOWARDS E-CONSUMER PROTECTION INITIATIVES: FINDING THE RIGHT PATH

One important aspect to consider when regulating e-consumer welfare in Tanzania is what kind of initiatives will be beneficial for Tanzanian e-consumers as well as e-businesses; so as to foster e-commerce.

There is a need to ensure that the purpose of consumer protection is not just litigation but rather to safeguard consumer welfare. There is also a need to ensure that the initiatives enacted take into consideration the local context and social, economic and cultural practices of the consumers.

There is a need to rethink what model of regulation should be adopted for Tanzanian e-consumers. Among these models is the self-regulation model. Whereas self-regulation may seem to be the answer for consumer protection in this era of information technology there is doubt that self-regulation will be effective in the Tanzanian scenario; not so much because of the criticisms that self-regulations receive,<sup>232</sup> but because of the reality of the situation in Tanzania.<sup>233</sup>

There are concerns that self-regulation is not an effective way of ensuring consumer protection.<sup>234</sup> It is argued that self-regulation is similar to modern corporatism where there is 'acquisition of power by groups which are not accountable to the body politic through the conventional constitutional channels.'<sup>235</sup> It is further argued that the capacity for such groups to make rules is 'on itself an abuse especially where the rules affect a third party.'<sup>236</sup>

Another concern is the concentration of power given the process from enactment to enforcement is overseen by one body; the very same body from whom consumers need protection. In light of this argument, it is evident that consumers will have little trust in these regulations as they raise doubts of impartiality.

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<sup>232</sup> Anthony Ogus, 'Rethinking Self-Regulation' (1995) 15 *Oxford Journal of Legal Studies* 97; Julia Black, 'Constitutionalising Self-Regulation' (1996) 59 *Modern Law Review* 24.

<sup>233</sup> This discussion is carried out further in Chapter Five of the thesis.

<sup>234</sup> Ogus, above n 230.

<sup>235</sup> Ibid 98.

<sup>236</sup> Ibid 99.

It is further argued that '[s]elf-regulation may work if the monopolistic power is well informed, well intentioned and well organized. However, many problems arise due to ill-informed, ill-intentioned and ill-organized power.'<sup>237</sup>

Self-regulation in Tanzania has started to emerge in recent years and has been confined to civil services and parastatal sectors.<sup>238</sup> However, these efforts have not been successful in addressing consumers' welfare.

A good example of this is the National Social Security Funds (NSSF) which has a consumer code.<sup>239</sup> Other public services such as banks also have consumer charters and codes of conduct.<sup>240</sup> However, all of these codes of conduct and charters are not well publicised and consumers know little about them.<sup>241</sup>

Another institution with self-regulation efforts is the Tanzania Bankers' Association (TBA) which has a Tanzania Bankers' Code of Practice. However, this too is ineffective. According to a study conducted by FinScope13 on the financial services sector; 'in Tanzania consumers of banking services are rendered with little protection despite having financial institutions legislation stipulating their rights.'<sup>242</sup>

Another institution that has established a code of conduct is the Tanzania Communications Regulatory Authority (TCRA). TCRA also has a consumer charter, however, it is argued that 'its ineffectiveness and lack of enforcement have risen a question as to whether self-regulatory efforts in Tanzania are realistic.'<sup>243</sup>

It is a view that self-regulatory efforts are not only unrealistic in Tanzania, but they are also detrimental.<sup>244</sup> This is because the compliant supplier to the code of conduct ends up being 'punished' through compliance, while the deviant supplier benefits as

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<sup>237</sup> Baldwin, R, 'Health and Safety at Work: Consensus and Self-Regulation' in R Baldwin and C McCrudden, *Regulation and Public Law* (Wiedenfeld and Nicolson, 1987) 153.

<sup>238</sup> Tenga, above n 182, 5.

<sup>239</sup> Ibid.

<sup>240</sup> Ibid.

<sup>241</sup> Ibid.

<sup>242</sup> Ibid.

<sup>243</sup> Ibid.

<sup>244</sup> Ibid.

he goes unpunished for non-compliance.<sup>245</sup>

Apart from these facts, self-regulation may not be the answer for Tanzania e-consumers. The status of consumer protection in the country, which fails to sufficiently protect consumers in general, overshadows the possibility of a successful self-regulation approach. Poor standards and service, and unsatisfactory measures on consumer protection leave little doubt on the suitability of the self-regulation approach in Tanzania. Self-regulation will work best where there is transparency, accountability, a true representation of consumers, effective monitoring and an enforcement mechanism; without these, the whole concept will be not function and will be viewed with scepticism as it is said in Tanzania ‘in case aggrieved by a monkey, do not expect a gorilla to give justice.’<sup>246</sup>

Furthermore, self-regulation will not be effective in Tanzania due to the lack of private consumer groups,<sup>247</sup> which are necessary in a self-regulatory regime as they provide checks and balances against monopolist powers.

It is evident that the nature and characteristics of the problems involved require new and extensive measures. Self-regulation will not only water down the seriousness of the matter, but will also place e-consumers in a more compromised position where they will not be afforded full protection. Given the situation in Tanzania, there is a danger of self-regulation initiatives in creating a façade of e-consumer protection and posing as a barrier to comprehensive regulation.

However, it is vital to realise that whereas self-regulation alone will be insufficient in protecting e-consumers in Tanzania, especially in C2C consumer transactions which are not regulated at all; it is still essential that businesses establish codes of practice. This will help create standards among businesses, define clear areas of responsibility and raise awareness and expectations amongst consumers.

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<sup>245</sup> Ibid.

<sup>246</sup> This is a saying which reflects the belief that one cannot be one’s own judge as one is likely to favour oneself.

<sup>247</sup> Currently there is only one effective private consumer protection organisation whose activities are also limited. See further discussion on this in Chapter Three.

# CHAPTER THREE

## 3. PROBLEMS ARISING IN ONLINE CONSUMER TRANSACTIONS

### 3.1 THE NATURE OF ONLINE TRANSACTIONS IN TANZANIA

Online transactions in Tanzania are on the increase (see Figure 3.1).<sup>1</sup> Research has revealed that people all over Tanzania are engaged in online shopping,<sup>2</sup> trading both locally<sup>3</sup> and across borders.<sup>4</sup> Furthermore, the introduction of the first fibre-optic international submarine cables in 2009 brought fundamental change to the internet market which had previously depended on costly satellite connections.<sup>5</sup>

This chapter lays out the facts regarding online transactions and what is happening in Tanzania. The nature of online transactions, how they are carried out, and problems arising out of such transactions is discussed. This creates the basis for analysis on the available measures and lays the foundation for recommending potential solutions for Tanzania.

Online transactions in Tanzania are closely integrated with mobile commerce (m-commerce). Sellers have web pages for their businesses where customers can view

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<sup>1</sup> Internet Live Stats, *Internet Users by Country (Tanzania 2014)*

<<http://www.internetlivestats.com/internet-users-by-country/>>.. See below at p 91.

<sup>2</sup> Bjørn Furuholt and Stein Kristiansen, 'A Rural-Urban Digital Divide? Regional Aspects of Internet Use in Tanzania' (Paper presented at the 9<sup>th</sup> International Conference on Social Implications of Computers in Developing Countries, São Paulo, Brazil, May 2007), 11

<<http://www.ifipwg94.org.br/fullpapers/R0090-1.pdf>>; United States of America, Department of Commerce, 'Selling U.S. Products and Services' in *Doing Business in Tanzania: 2011 Country Commercial Guide for U.S. Companies* (2011)

<[http://www.google.com.au/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&cad=rja&uact=8&ved=0CDIQFjAB&url=http%3A%2F%2Fphotos.state.gov%2Flibraries%2Ftanzania%2F231771%2FPDFs%2FCountry\\_Commercial\\_Guide\\_2011\\_Tanzania.pdf&ei=r7kkVIqpEMGF8gXD6IH0Bg&usg=AFQjCNGPQmD0JudFkQqCvH-8Q-Ok6ipG7w&bvm=bv.76247554,d.dGc](http://www.google.com.au/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&cad=rja&uact=8&ved=0CDIQFjAB&url=http%3A%2F%2Fphotos.state.gov%2Flibraries%2Ftanzania%2F231771%2FPDFs%2FCountry_Commercial_Guide_2011_Tanzania.pdf&ei=r7kkVIqpEMGF8gXD6IH0Bg&usg=AFQjCNGPQmD0JudFkQqCvH-8Q-Ok6ipG7w&bvm=bv.76247554,d.dGc)>.

<sup>3</sup> Examples include <<http://leteonline.com>>; <<http://www.kivuko.com/>>; <<http://www.emslies.co.tz>>; <<http://www.nunua.co.tz>>; <<http://tanzania-sokoni.com/about-us/>>; accessed September 2014.

<sup>4</sup> United States of America, Department of Commerce, above n 2.

<sup>5</sup> Mark Graham, *Development and Broadband Internet Access in East Africa* (March 2010) Oxford Internet Institute University of Oxford <<http://www.oii.ox.ac.uk/research/projects/?id=59>>; Austin Beyadi, 'Eassy Sub-Marine Cable Set to Go Live', *Tanzania Daily News* (online), 26 July 2010 <<http://allafrica.com/stories/201007261462.html>>.

products for sale before placing orders through email or phone. Only a few businesses trade fully online. Transactions in social media, such as through Facebook, have also increased due to the boom in social media and network websites (see Figure 3.2). By 2012, Tanzania had 705,460 Facebook subscribers;<sup>6</sup> this number will have since increased with the rise of mobile phone and internet use.

Some banks facilitate online commerce payments through debit cards which are linked internationally, mainly with Visa and MasterCard.<sup>7</sup> Other payment means are, direct bank deposits, money gram and telegraphic transfer. However, the popular mode of payment is through mobile phone money transfer services.<sup>8</sup> Mobile phone money transfer services are also available in neighbouring countries such as Kenya and Uganda, where the same phone companies operate, allowing for international transactions.<sup>9</sup> Features such as less bureaucracy, less expense and ease of access to the services have made mobile phone money transfer services popular compared to other services offered by banks and financial institutions in Tanzania.<sup>10</sup> It is asserted that the advance of mobile payments in Tanzania ‘offers a great infrastructure from which both basic and advanced financial services can be delivered to many Tanzanians’<sup>11</sup> (see Figure 3.3 at page 90 which illustrates financial access in Tanzania).

According to research conducted in Tanzania,<sup>12</sup> only two banks in the country dominate Electronic Funds Transfer at Point of Sale (EFTPOS),<sup>13</sup> and many of the cardholders use them to withdraw and deposit cash, either in a bank branch or through automated teller machines (ATMs). Only about 11% use their cards for purchase.

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<sup>6</sup> Internet World Stats, above n 1. See figure 3.2 below at page 89.

<sup>7</sup> International cards such as MasterCard and Visa may be accessible in big hotels investing in Tanzania such as the Sheraton Hotel and Holiday Inn.

<sup>8</sup> ‘Tanzania: Mobile Money Transfers Gaining Popularity’, *Tanzania Daily News* (online), 23 February 2014 <<http://allafrica.com/stories/201402230035.html>>; Orton Kiishweko, ‘Tanzania: Mobile Phone Companies Facilitate E-Commerce among Tanzanians’, *Tanzania Daily News* (online), 19 April 2010 <<http://allafrica.com/stories/201004191783.html>>.

<sup>9</sup> Fumbuka Ng'wanakilala, ‘Tanzania's Tigo Starts Cross-Border Mobile Money Transfer Service’, *Reuters* (online), 24 February 2014 <<http://www.reuters.com/article/2014/02/24/tanzania-tigo-idUSL6NOLT2W120140224>>.

<sup>10</sup> United States of America, Department of Commerce, above n 2.

<sup>11</sup> Simone di Castri and Lara Gidvani, *Enabling Mobile Money Policies in Tanzania: A “Test and Learn” Approach to Enabling Market-Led Digital Financial Services* (February 2014) <<http://www.gsma.com/mobilefordevelopment/wp-content/uploads/2014/03/Tanzania-Enabling-Mobile-Money-Policies.pdf>>.

<sup>12</sup> Tumsifu Elly and Victor Kavishe, ‘The Users’ Perception on Electronic Payment Systems in Tanzania’ (2008) <[www.orsea.net/pastpapers/2008/Tumsifu%20Elly\\_Orsea.doc](http://www.orsea.net/pastpapers/2008/Tumsifu%20Elly_Orsea.doc)>.

<sup>13</sup> These were identified as Exim Bank and CRDB Bank.

Three other banks<sup>14</sup> were offering internet transactions and limited MasterCard and Visa Debit cards at high charges.<sup>15</sup> Moreover, these available services are not easily accessed by the users. Most cardholders do not find ATM or EFTPOS access in the areas they shop or transact.<sup>16</sup> As a result, many consumers resort to mobile phone financial transactions and payment systems which are now more accessible in Tanzania. The mobile phone payment systems have also resulted in the integration of e-commerce and m-commerce within Tanzania.

The integration of online and mobile commerce is due to the fact that the mobile phone sector is more advanced than the internet communication sector. Tanzania had more mobile phone users (28,730,705)<sup>17</sup> compared to internet users (5,718,352)<sup>18</sup> in the year 2013/2014. Currently mobile penetration is approaching 70%, with annual subscriber growth of more than 20%.<sup>19</sup> Mobile phone services have penetrated the country including rural areas, while internet services remain limited to major towns and cities.<sup>20</sup> The Tanzanian mobile phone industry accounts for 5% of mobile phone subscribers in sub-Saharan Africa, and has the fourth highest number of subscribers after Nigeria (26%), South Africa (19%) and Kenya (7%).<sup>21</sup> The technology used by mobile phone companies, such as the third generation, high speed data access, popularly known as 3G technologies,<sup>22</sup> enables Tanzanian mobile phone users to access internet through their phones or computers by connecting a mobile phone as a modem.

As online transactions grow in Tanzania, unfair online practices, risks and consumer

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<sup>14</sup> Exim Bank, Barclays Bank and Citibank.

<sup>15</sup> Finnigan Wa Simbeye, 'Tanzania: BoT Chief Blames Banks On High Interest Rates', *Tanzania Daily News* (online), 9 November 2011 < <http://allafrica.com/stories/201111110464.html> >.

<sup>16</sup> Elly and Kavishe, above n 12.

<sup>17</sup> Tanzania Telecommunication Regulatory Authority (TCRA), *Quarterly Telecommunications Statistics Report* (June 2014) <<http://www.tcra.go.tz/images/documents/telecommunication/telcomStatsJune14.pdf>>.

<sup>18</sup> Ibid.

<sup>19</sup> Henry Lancaster, *Tanzania - Telecoms, Mobile, Broadband and Forecasts*, BuddeCom <<http://www.budde.com.au/Research/Tanzania-Telecoms-Mobile-Broadband-and-Forecasts.html>>; TCRA, above n 17.

<sup>20</sup> 'Tanzania: Mobile Money Transfers', above n 8.

<sup>21</sup> International Telecommunication Union, *Information Society Statistical Profiles: Africa* (ITU, 2009), 5 <[http://www.itu.int/ITU-D/ict/material/ISSP09-AFR\\_final-en.pdf](http://www.itu.int/ITU-D/ict/material/ISSP09-AFR_final-en.pdf)>.

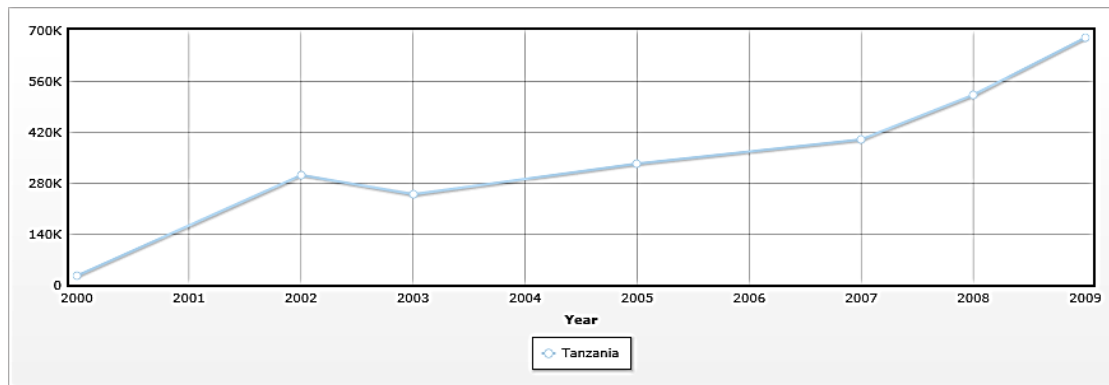
<sup>22</sup> Offered by firms such as Vodacom and Zain. See Tanzania Development Gateway, *Home* (22 September 2014) <<http://www.tanzaniagateway.org/contents.asp?topicid=19&T=Science%20and%20Technology>>.

rights violations also rise. There are several issues faced by e-consumers in Tanzania. The discussion categorises these issues in accordance with the time these problems occur; the formation, performance, payments and dispute resolution of electronic transactions (e-transactions). These issues are discussed in relation to the nature of the transactions, namely, business to consumer transactions (B2C) and consumer to consumer transactions (C2C).

It should be noted that issues concerning mobile commerce transactions will be incorporated in these discussions. This is necessary due to the major integration between online commercial activities and mobile commerce in Tanzania; which consequently form a mode of transaction unique to Tanzania. The mobile phones facilities have been a major boost and facilitator of online transactions and e-commerce in Tanzania. However, the discussion will be limited to the extent that it relates to e-commerce. More discussion relating to m-commerce consumer transactions will be discussed in chapter four of the thesis; however this discussion will also be limited for the purposes of this study.

**Figure 3.1 Internet Users in Tanzania**



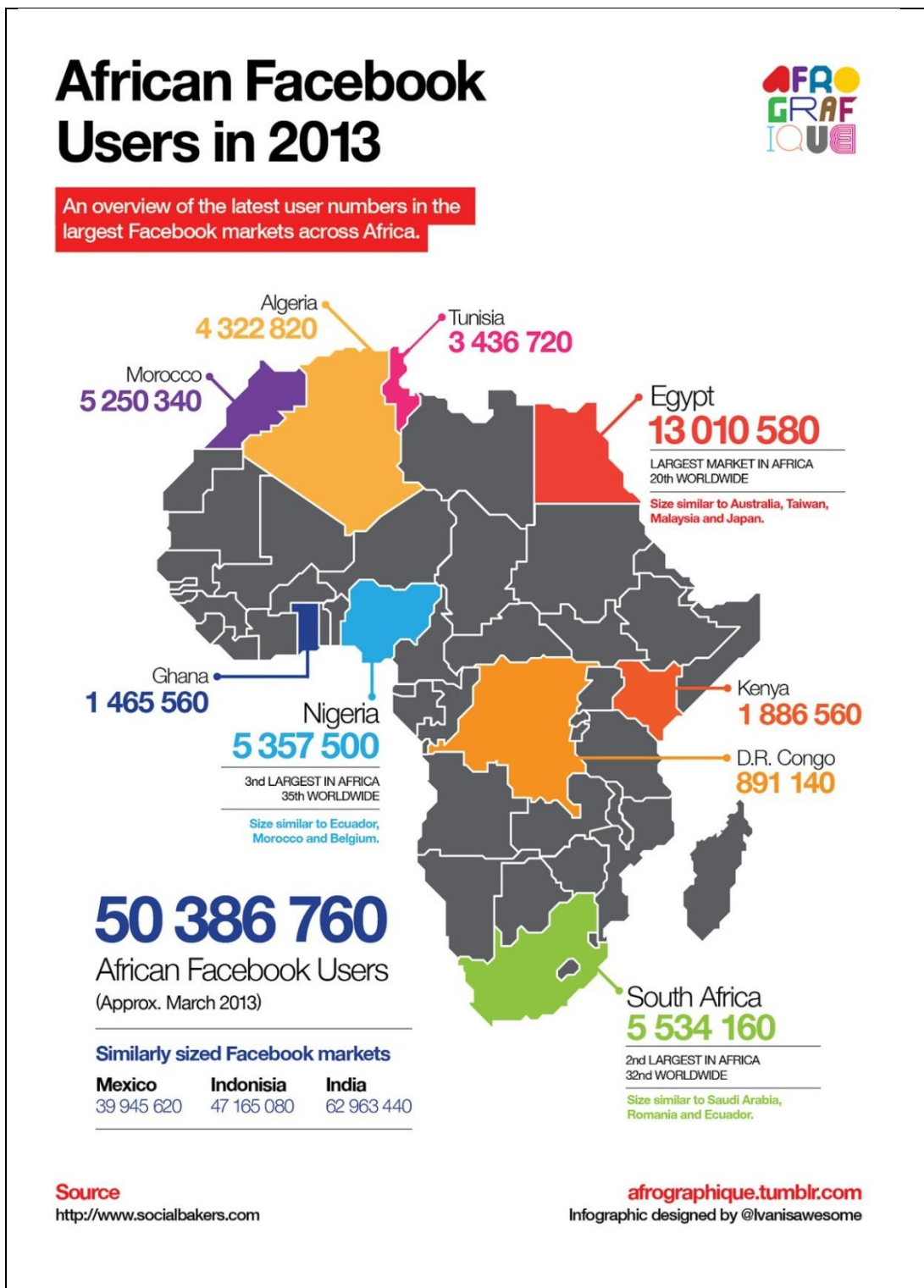


Country	2000	2002	2003	2005	2007	2008	2009
<a href="#">Tanzania</a>	25,000	300,000	250,000	333,000	400,000	520,000	678,000

Source: Internet Live Stats<sup>23</sup>

<sup>23</sup> Internet Live Stats, *Internet Users by Country* (Tanzania 2014)  
<<http://www.internetlivestats.com/internet-users-by-country/>>.

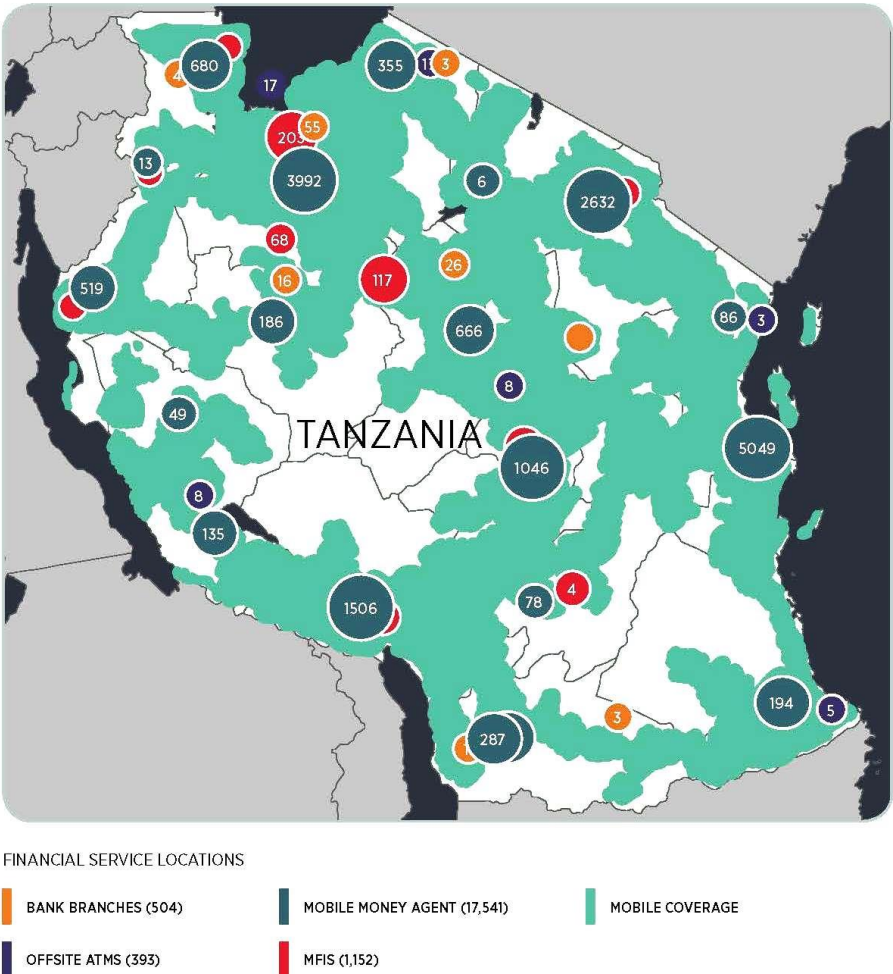
Figure 3.2 African Facebook Users in 2013



Source: Digital Marketing Lab<sup>24</sup>

<sup>24</sup> The figure shows an overview of the largest Facebook markets across Africa. Digital Marketing Lab, *Facebook and Mobile Users in Africa* (22 September 2014) The Marketing Explorer  
<<https://themarketingexplorer.wordpress.com/tag/africa-facebook-users/>>.

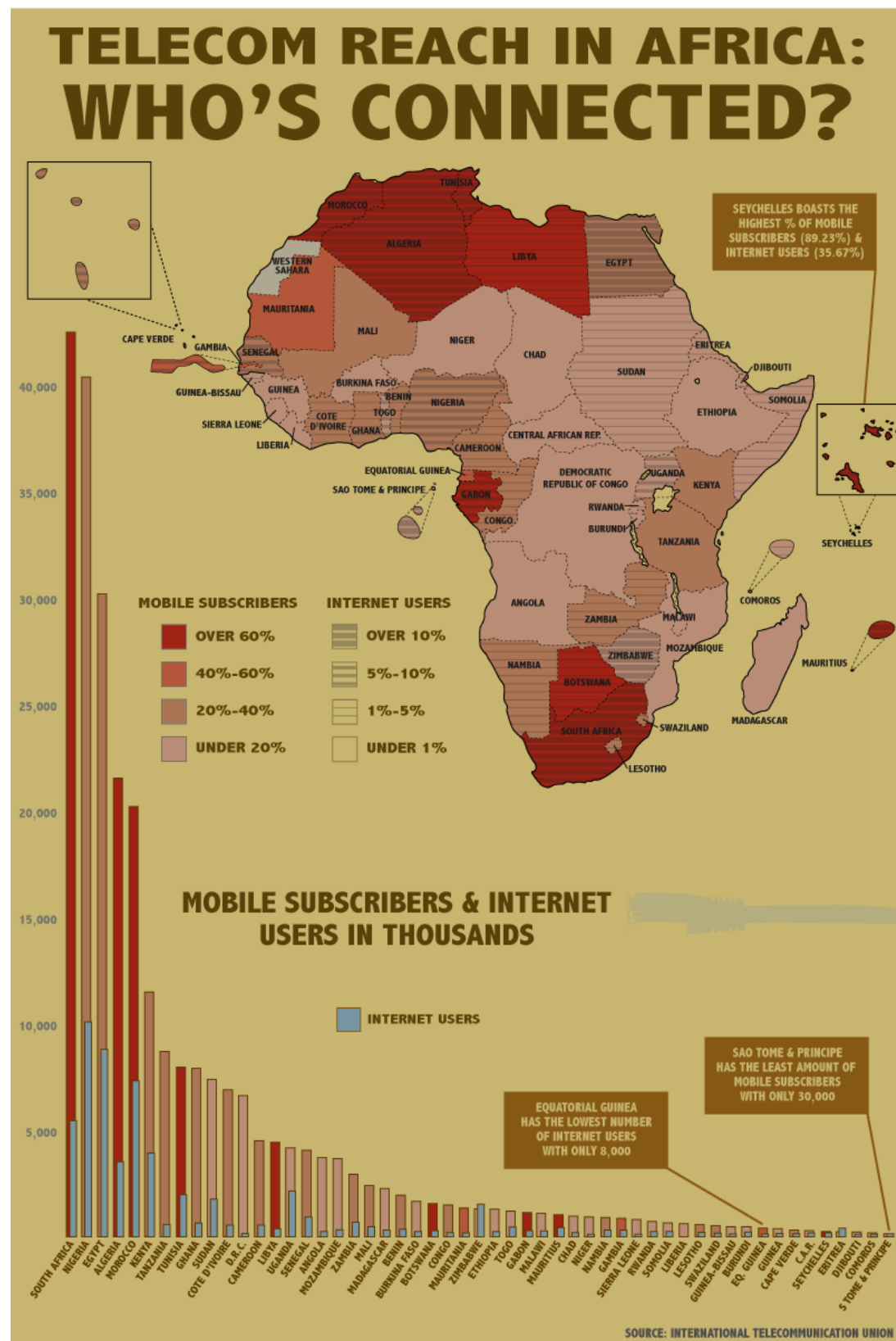
Figure 3.3 Map of Financial Access in Tanzania



Source: di Castri and Gidvani<sup>25</sup>

<sup>25</sup> di Castri and Gidvani, above n 11.

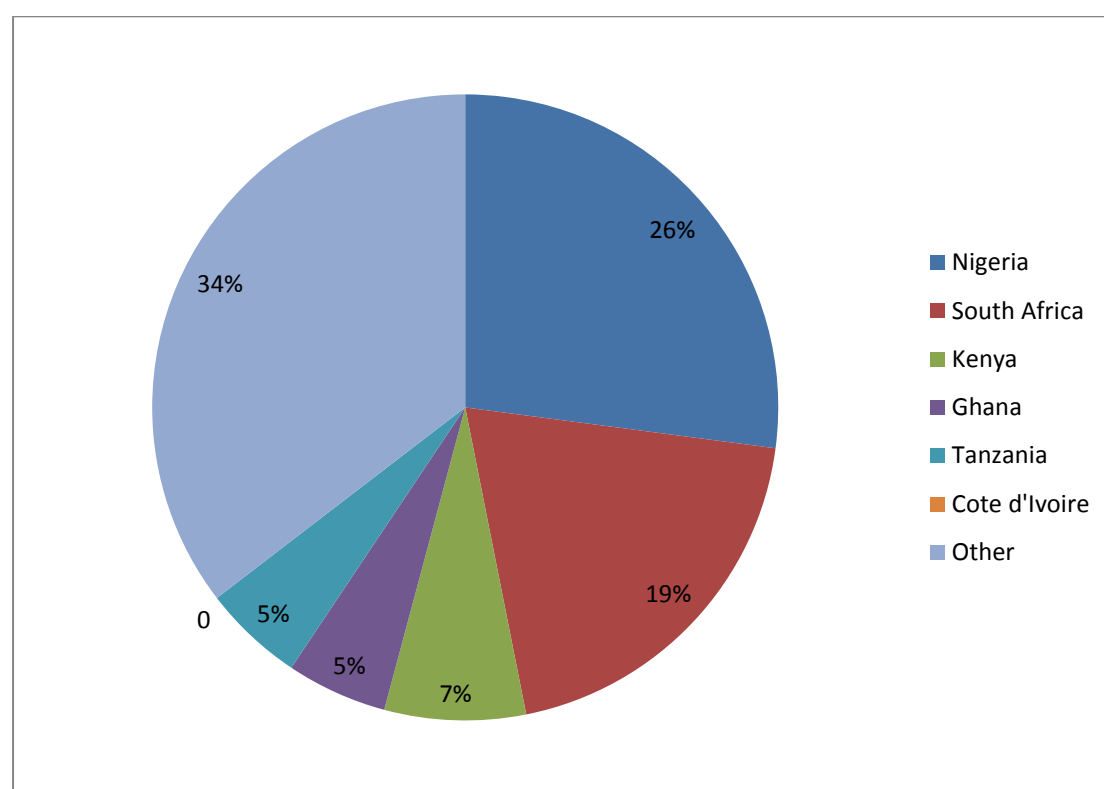
Figure 3.4 Mobile Subscribers and Internet Users in Africa, 2008



Source: International Telecommunication Union<sup>26</sup>

<sup>26</sup> Intac <<http://www.intac.net/telecom-reach-in-africa-whos-connected/>>.

**Figure 3.5 Mobile Subscribers in Africa, 2009**

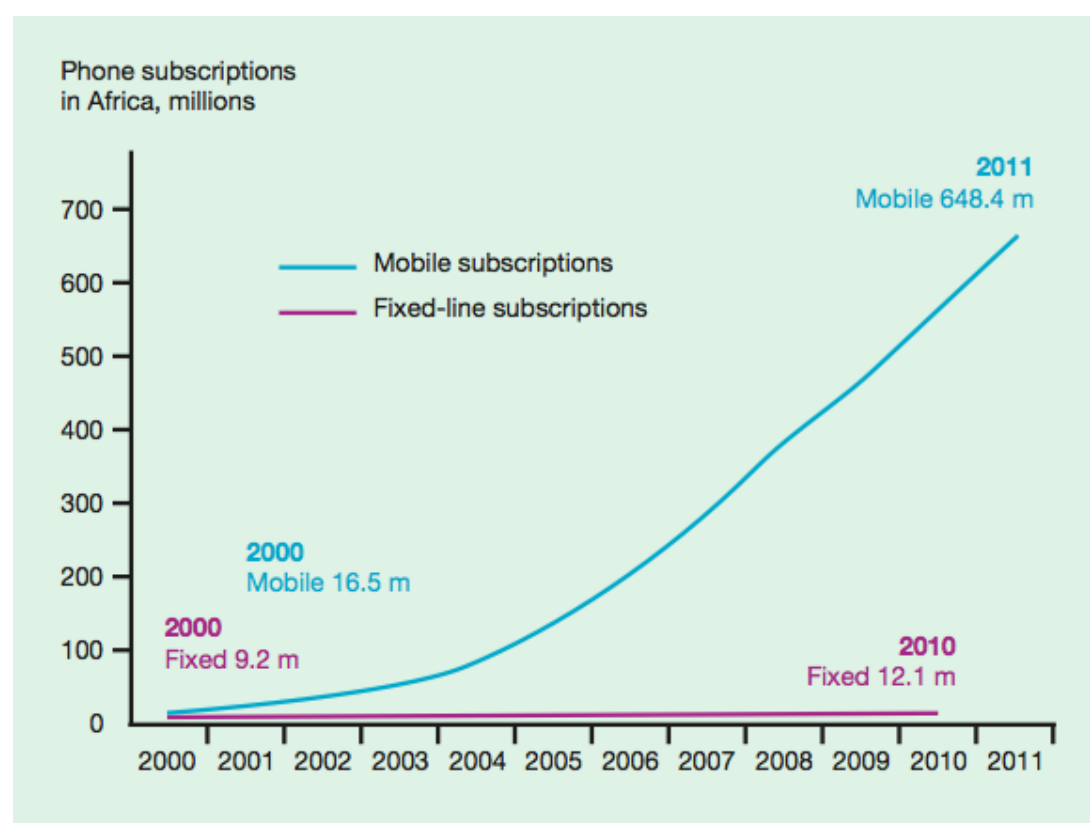


Source: International Telecommunication Union<sup>27</sup>

Figures 3.4 and 3.5 demonstrate the rapid growth of mobile phone use in Africa, particularly in Tanzania, within the short period of one year. This growth is evidenced further in Figure 3.6 which illustrates how mobile usage has grown 40 fold between 2000 – 2011.

<sup>27</sup> *Information Society Statistical Profiles: Africa* (ITU, 2009) <[http://www.itu.int/ITU-D/ict/material/ISSP09-AFR\\_final-en.pdf](http://www.itu.int/ITU-D/ict/material/ISSP09-AFR_final-en.pdf)>.

**Figure 3.6 Mobile Phone Growth in Africa, 2000 – 2011**



Source: Yonazi Enock et al (eds)<sup>28</sup>

### 3.2 PROBLEMS ARISING IN THE FORMATION OF ONLINE CONSUMER TRANSACTIONS

There are several problems that e-consumers in Tanzania face during the formation of online transactions. These range from fraud, language misunderstandings, unsolicited communication (spam), and a lack of information. These problems occur in different types of online transactions such as B2C and C2C online transactions. Some of these problems may be similar in nature; however, the content may differ in accordance with the type of transaction or the time it occurs. For instance, fraud in online transactions between B2C may contain different elements, content and possibly different solutions from fraud occurring in C2C online transactions. Also fraud during the formation of online transaction may involve sellers, whereas fraud committed

<sup>28</sup> 'The Transformational Use of Information and Communication Technologies in Africa' (Working Paper No 74550/1, World Bank, 28 May 2012)  
<<http://documents.worldbank.org/curated/en/2012/05/17120711/transformational-use-information-communication-technologies-africa>>.

during the payment stages of an online transaction may involve a third party acting independently. These differences are discussed below.

### **3.2.1 *Business to consumer (B2C) online transactions***

#### **(a) Introduction**

E-consumers who engage in B2C online transactions are faced with several issues that can lead to undesirable consequences. Some of these issues result in breaches of consumer welfare and trust. Similarly, there are online features that may be used in different ways to yield various undesired results. One such feature is hyperlinks which may be used by unscrupulous sellers to commit several online breaches of trust such as fraud, misleading actions, and unfair terms and conditions. This is further discussed below.

#### **(b) Issues of concern**

##### **(i) Fraud**

Among the problems that Tanzanian e-consumers face while transacting online is fraud. Fraud entails entering into a transaction with sellers whose only intention is financial gain through deception of consumers. These fraudsters use different techniques, such as opening new online businesses or hijacking genuine businesses' websites or online accounts and falsely posing as the original sellers, only to disappear after payments are completed by consumers.

Online fraud in Tanzania is massive, due to the fact that the online world in Tanzania is unregulated and hence a safe harbour for fraudsters. E-consumers lack the means for authenticating genuine sellers, and there is an absence of online dispute resolution facilities and a lack of information on security measures they can take while

transacting online.<sup>29</sup>

Online fraud is common, however, there is little information available for consumers and a low level of reporting incidents. The most documented incidents in Tanzania are those involving fraud in buying Japanese used cars from online websites, such as cars listed from Global Trading Co Ltd, Car Zone Japan, 41 Expo Inc Ltd, Progress Ltd, and The Trading Club.<sup>30</sup> There has been a major trend for individual consumers to buy used cars from Japan through online shops and websites.<sup>31</sup> A statement given by the Tanzanian Embassy in Japan warned Tanzania consumers to be careful when purchasing cars online from Japan, as in 2009 alone there was \$5 million (US) worth in fraud committed against consumers.<sup>32</sup>

Despite the widespread incidence of online fraud, there are few events documented and recorded due to the lack of available avenues for protecting e-consumers. Consumers have been reporting to the available consumer welfare organisations in the country, but these organisations have not been able to pursue matters because of limitations imposed on their powers. For example, the Tanzanian Consumer Advocacy Society (TCAS) deals mainly in advocacy and does not act on individual complaints.<sup>33</sup> It is argued that incidences of fraudulent car sales from Japan are recognised due to the efforts of the Japanese government, fearing that the trend could disrupt the lucrative used car business.<sup>34</sup>

## (ii) Misleading actions

Apart from fraud, e-consumers in Tanzania are faced with misleading actions. False

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<sup>29</sup> Discussion on available measures and efforts of online consumer protection in Tanzania is discussed in Chapter Five.

<sup>30</sup> See Lucas Japan Corporation, *Bogus Online Japanese Car Dealers* (13 February 2012) <[https://www.facebook.com/permalink.php?story\\_fbid=297282436998380&id=292364257490198](https://www.facebook.com/permalink.php?story_fbid=297282436998380&id=292364257490198)>; Wilfred Edwin, 'Bogus Car Dealers Drive Off With U.S. \$5 Million', *AllAfrica Global Media* (online), 16 November 2009 <<http://allafrica.com/stories/200911160180.html>>.

<sup>31</sup> See Autorec, *Customer's Voice and Review from Tanzania* (23 September 2014) <<http://www.autorec.co.jp/SLMtestimonials.php?MKT=TZ>>.

<sup>32</sup> Edwin, above n 30; see also Lucas Japan Corporation, above n 30.

<sup>33</sup> Interview with Bernard Kihyo, Director of Tanzania Consumer Advocacy Society (Dar es Salaam, May 2010).

<sup>34</sup> Edwin, above n 30.



statements or promises are made by sellers regarding the quality or nature of a product, so as to entice consumers to buy their products. Consequently consumers end up receiving products which are different from what they ordered, usually of lower value or counterfeit.

E-consumers in Tanzania have been victims of unsafe and counterfeit products.<sup>35</sup> As e-consumers rely only on sellers' information, they can easily be deceived by counterfeits. The provision of counterfeit goods is a problem facing both offline and online consumers. However, offline consumers in Tanzania can seek redress more easily because they are protected against counterfeit products to a certain level.<sup>36</sup> There are several reasons for e-consumers not having similar protection; there can be a lack of purchase records from online transactions and the dynamic nature of online shops means they can easily disappear. The situation may be further complicated where the transaction is cross border.

Misleading actions may also occur through online features. This is especially true in the case of hyperlinking and deep linking. Hyperlinks can be used to mislead customers into false domain names or into believing that they are shopping with particular sellers while this is not the case. Through hyperlinks, customers can be directed to different websites, products or services. Thus, it is easy for a consumer who has entered into a reliable website with a reputable trademark or business name to be directed through a click of a button to another website while believing it is still the same seller. Through this action, the consumer is not only misled as to the identity of the seller, but it is also highly likely the consumer will be misled about the quality

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<sup>35</sup> A report from the Fair Competition Commission published in the Guardian newspaper revealed that 50% of all imported goods from China are counterfeit and that 38% of all products imported in Tanzania are counterfeits. See Angel Navuri, 'Bulk of Kariakoo Imported Good Fake' on *Tanzania Consumer Advocacy Society Blog* (9 May 2009) <<http://tanzaniaconsumer.blogspot.com.au/2009/05/bulk-of-kariakoo-imported-good-fake.html>>. See also Ngwegwe Mussa, 'Tanzania: Fake, Substandard Goods Pose Risk to Local Industries', *Tanzania Daily News* (online), 23 May 2014 <<http://allafrica.com/stories/201405230124.html>>.

<sup>36</sup> There have been recent government efforts to counteract counterfeit trade in the country hence complaints from offline consumers are likely to rouse government interest, and perhaps investigation. For further information on such efforts please see various press releases at Tanzania Fair Competition Commission, *FCC Press Release: English Version Release* (2009-2014) <<http://www.competition.or.tz/download.php?list.14>>; Augustine Sangi, 'Fake Chinese Products in Tanzania Who is to Blame?', *Daily News* (online), 13 August 2010 <<http://www.trademarksa.org/news/fake-goods-trade-still-thrives>>; Marc Nkwame, 'Commission to Check Fake Goods in Homes', *Daily News* (online), 13 July 2010 <<http://archive.dailynews.co.tz/index.php/features/2013?view=archive&month=3>>.

or attributes of products or service and price value.

Furthermore, e-consumers' lack of knowledge<sup>37</sup> or confusion about new features of interactive websites can lead to misleading conduct by sellers. The nature of online interactive advertisements may easily confuse consumers. It is sometimes difficult to differentiate between mere information provided in a website and actual advertisements. Moreover, if contents are not presented in a specific manner, they can easily mislead consumers. A good example of this is where some websites are accompanied by sponsor advertisements which can easily be assumed to be part of the content of a website, or the advertisers to be affiliated with the sellers.

Consumers in Tanzania may also be misled in online transactions because of a lack of sufficient opportunities to review transactions. In the interactive online environment, consumers may be compelled to exercise their choices and preferences in a short timeframe, without having sufficient time to check the accuracy of the information or to make well informed decisions. In interactive websites, consumers may read a screen of information at a time, and may not always develop a sense of the full document they are reading from the outset; they may be required to follow several hyperlinks in order to do so. In such an environment, they may miss information, which would have brought different implications to a transaction, and if seen earlier by consumers, would have influenced them to act differently.

This situation is complicated further by the interactive or dynamic nature of online advertisements; information may disappear any time and it may be difficult for the consumer to refer back to a previous screen for clarification or more information. Consumers may end up with no records, consequently, they will not be able to prove that an advertisement or information they relied upon was posted on the website. It is essential that these uncertainties be addressed so as to further the welfare and protection of e-consumers.

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<sup>37</sup> A study of the knowledge and skills of internet end users in Tanzania revealed that self-training and/or gathering information from friends assisted them in using the internet. See Bukaza Chachage, 'Internet Cafés in Tanzania: A Study of the Knowledge and Skills of End-Users' (2001) 17 *Information Development* 226, 229-31 <<http://idv.sagepub.com/content/17/4/226.full.pdf+html>>.

### (iii) Language

Among other problems that Tanzanian consumers face during the formation of online transactions is the language factor. This problem manifests itself in several scenarios such as when all the transactions are completed in a common or international language such as English or Kiswahili.<sup>38</sup> The products are then delivered to consumers with instructions and information in different languages such as Chinese, Japanese, Arabic and Indian. These are not understood by Tanzanian consumers. Sometimes an online transaction is partially translated into English or Kiswahili but most of the transaction containing essential information such as terms and conditions, warranties and refunds, remains in a foreign language.

All these may lead to several consequences detrimental to consumers. Consumers may end up with a redundant product due to little understanding of the product. Consumers may also not be well informed on their rights about transactions, including not knowing all the terms and conditions of the particular transaction. Consumers may end up buying counterfeit goods. There has been a trend for importation of products from India, China and Dubai, with a majority of the products being counterfeit goods.<sup>39</sup> If the product information is in an unknown foreign language, consumers may be easily misled as to the authenticity of the product.

### (iv) Insufficient information

Lack of knowledge about a particular transaction is also a major problem for e-consumers in Tanzania. Consumers may not be conversant with simple facts about the products they are buying. For instance, electrical equipment from the US may have a different voltage currency from the Tanzanian voltage. This fact is not always obvious to a Tanzanian buyer at the time of purchase. If it is not well communicated, consumers may end up making ill informed decisions.

Lack of knowledge about other information regarding a transaction such as

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<sup>38</sup> Kiswahili is a national language and one of the official languages in Tanzania.

<sup>39</sup> See above n 35.

cancellation rights, return policy, technical support and warranty may affect consumer welfare. This information is important to consumers in making informed decisions on a particular purchase. One of the reasons for a lack of such information is that e-consumers in Tanzania are not provided with most of these rights.<sup>40</sup>

Furthermore, e-consumers in Tanzania are faced with uncertainty when it comes to the cost of products sought in online transactions. Among the reasons for this is the currency in which the items are listed. Some local businesses list their items in US dollars and may require payment in that currency. This may confuse the consumer as they will not know the final cost of the transaction given the exchange rates may change.<sup>41</sup>

(v) Unreasonable and high charges

E-consumers in Tanzania are faced with unreasonable and high handling and packaging charges. Shipping charges may cost the same as the buying price of the product or even higher. This may happen even when sellers are located within the same town as the buyers. For example, an e-consumer buying a 16 GB SanDisk USB flash disk costing 82,320 (Tsh) (US\$54) will have to pay 70,000 (Tsh) (US\$46) for

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<sup>40</sup> Ringo Tenga, 'Consumer Protection in Tanzania: Challenges and Prospects for the National Consumer Advocacy Council (NCAC)' (Paper presented at the Fair Competition Commission's Consumer Councils Induction Workshop, Morogoro, 25 April 2008) 8, 10; Jehovaness Zacharia, 'Here Are the Challenges Facing Tanzania Consumers When Using Insurance Services' on *Tanzania Consumer Advocacy Society Blog* (1 September 2010) <<http://tanzaniaconsumer.blogspot.com.au/2010/09/here-are-challenges-facing-tanzania.html>>; 12-15. Bernard Kihyo, 'Survey Report on the State of Consumer's Awareness and Attitudes towards Consumer Rights and Corporate Social Responsibility in Tanzania' on *Tanzania Consumer Advocacy Society Blog* (5 December 2007) <<http://tanzaniaconsumer.blogspot.com.au/2007/12/there-is-very-low-corporate-social.html>>.

<sup>41</sup> The problem with using US currency has been the topic of major discussion in Tanzania, different people have been airing their discontent in social forums such as blogs and newspapers. Furthermore, the problem has been discussed in one of the Tanzanian parliament sessions. However, satisfactory measures are yet to be taken in addressing the problem. For further information on this see Government of Tanzania, *Tamko La Serikali Kuhusu Matumizi ya Fedha za Kigeni Kulipia Bidhaa na Huduma Katika Soko la Ndani (Dollarisation)* (August 2007) Ministry of Finance and Economic Affairs <<http://www.mof.go.tz/mofdocs/news/speeches/TAMKO.pdf>>; John Mashaka, 'Dollarization of the Tanzanian Economy, Is Tanzania a Failed State Economically?.....Debate!' on *Issa Michuzi Blogspot* (19 October 2009) <<http://issamichuzi.blogspot.com/2009/10/dollarization-of-tanzanian-economy-is.html>>; Mdau Mkereketwa, 'Mjadala wa Dolari [Discussion on Dollar]' on *Issa Michuzi Blogspot* (10 January 2010) <<http://issamichuzi.blogspot.com/2009/01/mjadala-wa-dolari.html>>; Arsenal, 'Dollar Versus Shilling' on *Jamii Forums* (10 September 2008) <<http://www.jamiiforums.com/jukwaa-la-elimu-education-forum/17791-dollar-versus-shilling.html>>.

shipping to the same suburb, if they want their product to be delivered within seven days. The other choice is to pay less, but with a longer waiting period of 15 working days or more, for shipping to the same suburb.<sup>42</sup> Moreover, the shipping charges vary in accordance with the price of the item purchased. A 4 GB Sandisk flash disk will be shipped a little cheaper than a 16 GB Sandisk flash disk.<sup>43</sup> Similarly, violations can occur where the seller adds other charges, such as packaging and handling services, and middleman or broker fees, which were not expected or explained to buyers before purchase.

(vi) Mistakes and errors

A lack of opportunity to correct mistakes, and insufficient information disclosure on mistakes, are other problems that Tanzanian consumers face. Buyers are not given the opportunity to correct input errors or similar mistakes which can easily be corrected if consumers were given the opportunity to review and confirm their transactions.

(vii) Spam

Among other problems that Tanzania e-consumers face is spam.<sup>44</sup> E-consumers receive constant unsolicited emails originating from inside and outside Tanzania. Figure 3.7 (at page 103) demonstrates that some spam has been traced back to IP addresses in Tanzania. Spamming is one of the popular means of electronic advertisements. Their personalised and private nature is more likely to convince consumers to believe in their content. The misleading nature of unsolicited emails may vary depending on the intention of the spammer. Some of the spam emails may contain another person's domain name or email address different from the spammer,

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<sup>42</sup> This was the situation in one of the Tanzanias online shops visited by the writer. Document on file with the author.

<sup>43</sup> Ibid.

<sup>44</sup> Information given by Project Honey Pot, a free initiative that uses a software to collect information about IP addresses that are being used for malicious purposes such as harvesting e-mail addresses for spam, bulk mailing and other email fraud, revealed several malicious IPs located in Tanzania were set to yield spam. See See Project Honey Pot, Directory of Malicious IPs : A List of Malicious IP Addresses Allocated in Tanzania on 25 September 2014

<[http://projecthoneypot.org/list\\_of\\_ips.php?by=13&ctry=TZ](http://projecthoneypot.org/list_of_ips.php?by=13&ctry=TZ)> accessed at 25/09/2014.

or contain false header information, all with the aim of misleading the receiver as to the true identity of the sender/seller. Other spam emails go further and include misleading content such as the quality, origin and price of the product or service advertised. Spam emails may even contain fraudulent information with the aim of obtaining bank account details or other information that could be used fraudulently.

Unsolicited commercial email advertisements may be used by businesses to genuinely advertise their businesses, however, there are equal chances that the same may be used by dishonest businesses to mislead or misrepresent their information to consumers. These emails may mislead consumers by including a subject line different to the content, by containing a bait advertisement or by referral selling. Even in instances where the spam emails may not contain misleading contents, consumers are likely to end up being misled. For example, if a consumer acts on offers or sale promotions received by email, they may not realise that the offer has ended and therefore they have to pay regular prices for the transaction. Therefore, e-consumers will end up buying products which they would not have if they were informed otherwise.

Furthermore, spamming can create other problems such as the increase of virus propagation to consumer email accounts and the clogging of consumer email accounts. This costs consumers time and money.

#### (viii) Unfair terms and conditions

Consumers in Tanzania are also faced with unfair terms and conditions on transactions they enter online. This occurs in different ways such as in 'browse wrap' and 'click wrap' transactions where buyers are not presented with enough opportunity to view all the terms governing a transaction they are entering into. As a result consumers may not be aware of the terms and conditions until after accepting or concluding a transaction. Sometimes, the terms and conditions in a transaction involving 'browse wrap' and 'click wrap' agreements are provided, however, due to the manner in which they are provided, they may not be easily identifiable by

consumers. This may happen where terms are presented through hyperlink.<sup>45</sup> Depending on the architecture and design of a website the user may not immediately be aware of the hyperlink or the terms and conditions presented.<sup>46</sup>

Similarly, very long detailed and full of jargon standard terms may pose a problem to e-consumers, who may not be able to read everything at the time they are entering a transaction and/or might not have any choice but to accept the terms provided.<sup>47</sup> Furthermore, websites can vary their terms and conditions without adequate notice to consumers. All of these pose a challenge as to the certainty, adequacy and fairness of terms and conditions provided in electronic transactions; as not only may the consumer be unaware of the terms and conditions, but also the content of these terms and conditions may be unfair or contain unfair clauses.

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<sup>45</sup> Uncertainties caused by hyperlinks are also discussed under part 3.2.1 (b)(ii) above. However, the discussion differs in context; where under part 3.2.1 (b) (ii) above, hyperlinks are used as tools to mislead buyers by directing them to different websites. This discussion points out that hyperlinks, containing terms and conditions, may not be conspicuous enough to be noticed by buyers.

<sup>46</sup> Some of these links are presented at the bottom of the site where it can only be visible to the users when they scroll down a web page. Such was the case in *Specht v Netscape Communications Corp*, 306 F 3d 17 (2<sup>nd</sup> Cir, 2002).

<sup>47</sup> This type of presentation has been described as user-hostile prose in the smallest of fonts, located in an obscure part of the site, not readily identified by a casual visitor and presented in a format that significantly inhibits user understanding. See Caslon Analytics guide 'Online Consumers: Warranties' <<http://www.caslon.com.au/consumersguide18.htm#boilerplate>> accessed on 25/09/2014.

**Figure 3.7 A List of Malicious IP Addresses Allocated in Tanzania on 25 September 2014<sup>48</sup>**

Malicious IP	Event	Total	First	Last
<a href="#">196.45.157.108</a>	Spam	2	2014-07-31	2014-09-25
<a href="#">196.41.60.250</a>   S	Spam	12	2011-11-02	2014-09-24
<a href="#">196.41.61.20</a>	Spam	1	2014-09-24	2014-09-24
<a href="#">41.221.55.110</a>   S	Spam	3	2012-09-19	2014-09-24
<a href="#">41.223.7.101</a>   SD	Spam	50	2014-04-24	2014-09-23
<a href="#">196.43.76.190</a>   SD	Spam	42	2007-02-07	2014-09-22
<a href="#">196.41.43.195</a>   SD	Spam	33	2014-06-24	2014-09-21
<a href="#">196.41.60.162</a>   SD	Spam	14	2009-03-13	2014-09-17
<a href="#">41.222.89.74</a>   D	Spam	1	2014-09-15	2014-09-15
<a href="#">196.45.42.2</a>   S	Spam	9	2013-09-03	2014-09-12
<a href="#">196.43.68.130</a>   SD	Spam	15	2009-10-07	2014-09-11
<a href="#">41.188.183.254</a>	Spam	1	2014-09-10	2014-09-10
<a href="#">196.41.36.66</a>   SD	Spam	210	2009-06-05	2014-09-10
<a href="#">216.104.205.79</a>   SD	Spam	49	2011-04-07	2014-09-09
<a href="#">41.222.177.124</a>   DC	Spam	4	2013-11-11	2014-09-09
<a href="#">41.188.182.246</a>   S	Spam	3	2014-09-08	2014-09-09
<a href="#">41.222.177.96</a>   D	Spam	2	2014-02-28	2014-09-04
<a href="#">41.188.183.166</a>	Spam	2	2014-06-20	2014-09-03
<a href="#">41.188.150.131</a>   SD	Spam	61	2013-07-18	2014-08-31
<a href="#">41.188.183.246</a>   SD	Spam	61	2014-03-11	2014-08-28
<a href="#">196.45.154.210</a>   SD	Spam	15	2014-07-03	2014-08-28
<a href="#">196.41.36.226</a>	Spam	1	2014-08-25	2014-08-25
<a href="#">196.43.87.138</a>   SD	Spam	59	2010-05-20	2014-08-19
<a href="#">41.221.41.61</a>   S	Spam	6	2014-05-02	2014-08-15
<a href="#">41.188.150.169</a>   SD	Spam	25	2010-11-04	2014-08-15
Click any IP address for more details		Last updated: September 25 2014 08:11:08 PM		

Source: Project Honey Pot Directory of Malicious IPs<sup>49</sup>

### 3.2.2 Consumer to consumer (C2C) online transactions

#### (a) Introduction

Consumer to Consumer (C2C) e-commerce is a popular mode of e-commerce in

<sup>48</sup> This list is limited to 25 Malicious IP addresses arranged by their last spam email and located in Tanzania, however, the original list contains more.

<sup>49</sup> Project Honey Pot, above n 44.



Tanzania.<sup>50</sup> This is carried out in different forms such as the selling of goods on online auctions websites<sup>51</sup> or through individual advertisements and selling through online social networks such as blogs and forums. Blogs and forums are popular meeting points for all types of people in Tanzania. These blogs and forums are seen as revolutionary tools of technology where people can engage in instant interactions, including articulating problems, discussing political, social and economic issues, and selling and buying goods and services. It is estimated that at least 10 to 20 blogs, or online forums, are created every week by Tanzanians.<sup>52</sup>

In Tanzania, these forms of C2C e-commerce have different operating features depending on where they take place, the price of the products and services offered and the proximity between parties.<sup>53</sup> Consequently, different problems arise in each of these forms.

This discussion is divided into two parts, where two different types of C2C transactions, namely, online auctions and social network sales, are discussed. It is necessary to separate these two as they differ in operation and character. Consequently, the liabilities and limitations also differ.

A notable difference between the two is their operation. Online auctions involve intermediaries, known as e-auctioneers, who play an active role in facilitating the transactions. In social networks the intermediaries/forum owners play a passive role with very little or no participation. Moreover, the main aim of social networks is socialising and networking, with few exceptions. This is not the case in online auctions. These and other features will be discussed below.

It should be noted that some of the problems discussed in the previous section also

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<sup>50</sup> See for example 'Saa Inauzwa Michuzi [Watch for Sell]' on *Michuzi* (25 September 2014) <<http://issamichuzi.blogspot.com/2010/09/mdau-anaipiga-bei-hii.html#comments>>; <<http://sherianamavazi.blogspot.com.au/>>; <<http://homezdeco.blogspot.com/>>; <<http://www.8020fashionsblog.com/>>; accessed 25 September 2014.

<sup>51</sup> Such as in <<http://www.kivuko.com/>>; <<http://magaribeipoa.com/>>; <<http://bongofree.com/>>; accessed 25 September 2014.

<sup>52</sup> Muhidin I Michuzi, 'Presentation by Muhidin Issa Michuzi at Diaspora 2' (Presented at Tanzania Diaspora and Skills Forum, London, 18 April 2008) <[www.tanzania-online.gov.uk/web/images/issamichuzi.ppt](http://www.tanzania-online.gov.uk/web/images/issamichuzi.ppt)>.

<sup>53</sup> Please refer to Figure 3.8 which shows the operating features of C2C e-commerce in Tanzania.

occur in C2C transactions. However, in this section, only problems unique to C2C transactions will be discussed.

**Figure 3.8 Operating Features of C2C Electronic Commerce in Tanzania**

	Local	International	Both
Price	<ul style="list-style-type: none"> <li>- Fixed or negotiable</li> </ul>	<ul style="list-style-type: none"> <li>- Fixed</li> <li>- Best offer</li> </ul>	<ul style="list-style-type: none"> <li>- Fixed</li> <li>- Best offer</li> <li>- Negotiable</li> </ul>
Proximity	<ul style="list-style-type: none"> <li>- Direct contact with sellers</li> </ul>	<ul style="list-style-type: none"> <li>- Third party contact;</li> <li>- Website operators facilitate sales.</li> <li>- Contact with seller but auctioneer moderators remain a key contact.</li> </ul>	<ul style="list-style-type: none"> <li>- Direct contact with local sellers</li> <li>- limited contact with international sellers through website operators</li> <li>- Contact with website operators</li> </ul>
Mode of Payment	<ul style="list-style-type: none"> <li>- Cash on Delivery</li> <li>- Mobile phone Electronic Fund Transfers</li> </ul>	<ul style="list-style-type: none"> <li>- Pay pal</li> <li>- Western Union</li> </ul>	<ul style="list-style-type: none"> <li>- Visa cards</li> <li>- Pay pal</li> <li>- Cash on Delivery</li> <li>- Mobile phone Electronic Fund Transfers</li> </ul>

#### **(b) Problems in Online Auctions**

Online auctions are C2C online sales facilitated by a third party, normally a website

owner, who acts as the intermediary between the seller and buyer. Most of the sellers are private individuals, and the products can range from new to second hand products.

Depending on the website facilities offered, an individual may be able to have direct contact with the seller or just the auctioneer. This is especially so due to the fact that the website owner may be facilitating transactions with sellers who are outside the Tanzanian jurisdiction.<sup>54</sup>

As shown in Figure 3.8, Tanzanian online auctions have different features and styles of selling. This includes offering fixed prices for the products on their websites,<sup>55</sup> and listing items for sale where prices are negotiable, depending on whether these online auctions are operating only at the local level or not. Following are several problems which arise in online auctions.

(i) The role and liabilities of the intermediaries

Among the problems with online auctions is understanding and regulating relations arising in transactions. In Tanzania, auctions are regulated under the *The Auctioneers Act, 1976* [CAP 227 R.E. 2002], which requires the auctioneer to be licensed and to pay fees. Furthermore, *The Sale of Goods Act, 1931* [18 of 1931, Cap 214 R.E. 2000] has provisions regulating auctions<sup>56</sup> where it states that ‘a sale by auction is complete when the auctioneer announces its completion by the fall of the hammer or in other customary manner....’<sup>57</sup> The relationship and obligations between the auctioneer and seller are legally established in the available statutes and law principles such as law of agency. Furthermore, buyers have the opportunity to physically examine the products, and upon winning the auction, they pay the auctioneer who then provides them with the won products. However, this is different from online auctions. Online auctioneers (e-auctioneers) play a minimal role in facilitating the sale between the seller and

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<sup>54</sup> A good example of this is the Tanzania online auction website known as Kivuko where vendors all over the world are invited to list their items to sell to buyers and pay certain fees to website owners in a style similar to eBay, see Kivuko, *How Kivuko Vendor System Works* (25 September 2014) <<http://www.kivuko.com/pages/How-kivuko-vendor-System-Works.html>>.

<sup>55</sup> Such as is the case with Kivuko website.

<sup>56</sup> *The Sales of Goods Act, 1931* [18 of 1931, Cap 214 R.E. 2000] s 59.

<sup>57</sup> Ibid.

buyer. In jurisdictions like Tanzania, where these transactions are not well regulated, uncertainties arise among parties.

One uncertainty is the limitation on liability that the e-auctioneers have in transactions carried out on their websites. Because they are only online website facilitators; providing the products through registering approved sellers and providing the means such as the mechanics of ending the auctions, they are an independent identity and not part of the online transaction. Even though they may assure buyers of certain safety measures and protection mechanisms on their websites, they are not liable in cases where problems arise in transactions they have facilitated.

The situation is further complicated in Tanzania where the conclusion of sales may be conducted outside, or separate from, the auction site owners, especially during payments through mobile phone facilities such as M-pesa, Western Union or other similar third party facilitated payment services. This raises different implications. First of all, it limits the facilitation role of the e-auctioneers as they may not be able to establish whether such payments occurred, and hence are unable to facilitate refunds or mediate the transactions. Secondly, such practices involve many independent key players in one transaction; the online seller, e-auctioneer, and mobile phone operators or financial institutions, whose roles and liability are not well set out in Tanzania. The consequences of not regulating such transactions are e-consumers being faced with uncertainties in cases of dispute.

Questions as to the legal liability of these e-auctioneers are unlikely to receive a legally precise answer in the local jurisdiction. They cannot be held liable as auctioneers as in the legal sense they are not auctioneers because they do not satisfy the legal definition of auctioneers given in the available statutes. They are not licensed to work as auctioneers; and they are not acting as agents of the sellers and hence available principles such as the law of agency cannot be applied.<sup>58</sup>

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<sup>58</sup> The discussion on available principles establishing the legal status of e-auctioneers is discussed further in Chapter Five.

## (ii) Anonymous nature of online auctions

Among the features present in online auctions is the use of proxy or nicknames by parties to a transaction. This creates anonymity which does not equally exist in B2C electronic transactions.<sup>59</sup> It is common practice in online auctions for sellers and buyers to conclude a transaction in their nicknames. The true identity of a party may be known in cases where such information is requested by one of the parties or where payments are made through bank accounts, and bank details are required. This feature makes online auctions vulnerable to fraud as e-consumers do not know the authenticity and true identity of sellers they are dealing with.<sup>60</sup> A lack of clear online auction operator liability and other features of online auctions make e-consumers more vulnerable to the anonymity feature, resulting in higher fraudulent actions than is the case in B2C online transactions.

This is further exacerbated because the majority of online auctions do not enforce strong authentication measures for consumers who transact through their web pages. The normal practice is to use a user ID and password to identify and validate a member. This method is easier to violate with online robotic software which can enter ID and passwords on a web page to sign in. Verifying a log in with auto generated password or codes can save a consumer from possible violations. However, other measures should also be incorporated to make online auction sites more secure.

## (iii) Limitation of rights

As some of the online auctions sales are private individual sales, it is uncertain whether they will be covered by the available traditional laws which were enacted to regulate business to consumer relationships.<sup>61</sup> These traditional laws did not take online characteristics into consideration such as: the inability of e-consumers to have

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<sup>59</sup> There may be instances where sellers or buyers may conceal their true identity in B2C transactions where there are fraudulent intentions, but it is not as common a practice as it is in online auctions.

<sup>60</sup> This is more so due to the trust that e-consumers have with a particular auction website, as they may believe that the intermediaries will be responsible for the transactions carried out on their website and provide a secure environment.

<sup>61</sup> Practices in some of the online auctions have shown a trend that C2C online auctions are not given similar protection as with other e-commerce transactions; rights for cooling off periods, returns and refunds by buyers is limited.

face-to-face interaction; the ease with which sellers can disguise their identity and items for sale; the increased vulnerability of e-consumers from providing personal financial details and paying for extra charges such as handling and delivery costs.

Moreover, e-consumers in online auctions may not be covered by traditional protections due to the fact they were never intended to regulate online C2C relations. A good example of this is the warranties, refunds and returns offered in B2C transactions which may not be equally offered in C2C transactions as these rights cannot be transferred to a third party, or because the products bought are second hand products from other individual consumers who cannot offer warranties or refunds.. There is no doubt that e-consumers buying through online auctions do have protection and are entitled to certain rights such as the right to receive the title of goods bought and receive goods in a condition described by the sellers. However, it is uncertain to what extent they are protected.

#### (iv) Integration of B2C and C2C in C2C transactions

There is significant integration of both B2C and C2C transactions in online auctions. Businesses as well as individual consumers participate in selling products. This can create uncertainty for consumers in identifying and determining whether the transactions they enter into are with professional or individual sellers, as the differences between the two can be blurred. This is particularly so in online auctions in Tanzania where some e-auctioneers play an additional role and represent different sellers on their websites. Sometimes the e-auctioneers post goods auctioned on behalf of other sellers.<sup>62</sup>

This representation of sellers in the actual listing and selling of products by e-auctioneers in their online auction web pages is necessitated by the reality that the majority of goods and products in Tanzania are imported from different countries.

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<sup>62</sup> For example <<http://www.kivuko.com>>; <<http://www.nifahamishe.com/buyandsell.aspx>>. See also Kivuko, above n 54. The importing of hard to find products into Tanzania is popular as there is higher demand amongst consumers. E-auctioneers in Tanzania may offer to represent sellers from abroad and sell their products in their auctioning websites. Products may range from newly launched products such as ipads, iphone 4, to hard to find goods such as medical supplies.

Some of the e-auctioneers advertise their websites abroad for individuals or businesses targeting the Tanzanian market. These sellers abroad then ship consignments to Tanzanian e-auctioneers who sell them through their online auction shops. In the case of warranties, returns and such facilities, where offered at all, goods must be returned abroad.<sup>63</sup>

As local online auctions in Tanzania are a recent phenomenon, most website owners introduce new features and change their operation style according to the demand in market and social practices. Hence, it is likely to find some of the online auctions are no longer auctions, but have converted to web shops, or even stopped operating.<sup>64</sup> These variations create a need to clearly define the rights and responsibilities of all parties engaging in C2C e-transactions such as online auctions.

#### (v) Shill bidding

Shill bidding in online auctions<sup>65</sup> happens when a seller of an item increases the price of an item by bidding on their own product through a second account, or getting a third party to act on their behalf to raise the final sale price. E-consumers subject to shill bidding may believe the item to be popular due to the number of bids that may appear in a listed item, or may believe the item to be of high value due to the high bids entered for a particular product. These actions may induce e-consumers to bid more than they would have if shill bidding hadn't occurred.

Some online auction sites such as eBay have policies prohibiting shill bidding and inform their customers on how to deal with shill bidding incidents.<sup>66</sup> However, this is

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<sup>63</sup> See for example Kivuko, *Shipping and Returns* (25 September 2014) <<http://www.kivuko.com/pages/Shipping-%26>Returns.html>>.

<sup>64</sup> A good example of this is <<http://leteraha.com>> (last accessed 29 October 2010) which a few months ago was still operating although it appears now to be 'coming soon'.

<sup>65</sup> This form of fraud occurs in 'English auctions' which are popular in eBay and other online auction websites. Similar fraudulent auctions occur in other types of online auctions with different names depending on the practise of bidding. An instance of this is false bids which can be carried out in second price sealed bid auctions. For further reference please see Mamata Jenamani et al, 'Cheating in Online Auctions – Towards Explaining the Popularity of English Auctions' (2007) 6 *Electronic Commerce Research and Application* 53.

<sup>66</sup> See eBay, *Shill Bidding Policy* (26 September 2014) <<http://pages.ebay.com/help/policies/seller-shill-bidding.html>>; see also Mike Melanson, *Ebay Seller Convicted, Fined for "Shill Bidding"* (6 July

generally only the case with well-established online auction websites. These websites provide their customers with avenues to solve their problems and offer buyer protection schemes to stop fraudsters who target their websites. This may not be the case with local online auction websites in Tanzania where little customer protection is offered.

(vi) Cancellation and retraction of bids

Another concern which needs attention in online auctions is the cancellation and retraction of bids. The practice with online auctions is that bids cannot be cancelled once they have been entered. Some online auction owners allow exceptions in cases of input errors or where sellers cannot be reached,<sup>67</sup> however, many do not.<sup>68</sup> This raises concerns because online auctions can go for days or weeks. Moreover, sellers may change details on the products offered. Also different mechanisms of data entry are used where e-consumers can easily enter wrong data. E-consumers can easily be denied their rights of choice or the right to correct an error by not being allowed to retract or cancel a bid.

The denial of retraction or cancellation of bids also calls for examination of the available principles of law. Questions as to what extent the online auction bids are binding, whether bids are an invitation to treat or statements of offer, needs to be addressed in Tanzania jurisdiction.

(vii) Automatic bidding

Auto agent bidding in online auctions is another concern for consumers engaging in online auctions. This occurs when the auctioning website offers buyers an opportunity to bid through an automatic bidding system. In this system buyers enter the maximum

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2010) Readwrite

<[http://www.readwriteweb.com/archives/ebay\\_seller\\_convicted\\_fined\\_for\\_shill\\_bidding.php](http://www.readwriteweb.com/archives/ebay_seller_convicted_fined_for_shill_bidding.php)>.

<sup>67</sup>See

<<http://www.auctionbeads.com/faq.shtml#Can%20I%20retract%20my%20bid%20once%20I%20have%20confirmed%20it?>> accessed 26 September 2014.

<sup>68</sup> See Ophelie, *Can I Retract My Bid?* (29 November 2012) Flippa <<http://flippa.com/help/retract-bid-or-offer>>.



amount of money they are willing to pay for a particular item. The system then bids on behalf of the buyer starting with the next bid increment for the auction. The system keeps bidding on behalf of the buyer to make sure that the buyer is the highest bidder until the maximum amount set is reached.

While this system may have advantages for buyers (they do not have to check and increase their bids to the maximum amount they want to spend), it may have disadvantages if not carefully operated. For instance, in the case of shill bidding, or where one buyer's bid is retracted and the bid of the buyer using an out agent system is not reset to the lower amount when all the previous bids were bids by the retracted bidder.

Furthermore, if the auto agents are set to bid at a faster rate than normal human bidding, bidding may rise quickly, resulting in an item being sold at a price higher than if only normal human bids were involved or the bid intervals were slower.<sup>69</sup> Items being sold at higher prices occur for two reasons. First, the items appear popular due to the high number of bids and hence, attract more bidders. Secondly, because the auction lasts for a long time, the more and faster you increase the bidding, the higher the item is going to be at the end of the auction.

#### (viii) Multiple functioning feature of online auctions

E-consumers in Tanzania may be faced with uncertainties due to a lack of knowledge of auction features when participating in online auctions. As every website operator has the discretion to decide which auction system to offer, features in online auctions may vary. Some auctions have immediate buying or bid options, while others may only offer options for immediate buying. Some online auctions have straight forward bidding systems, such as in the English auction model (such as eBay), where consumers place incremental bids. However, some auction websites may have more complex or unfavourable features.

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<sup>69</sup> Ken Rockwell, *How to Lose at eBay: Pitfalls of Early Bidding* (December 2009) <<http://www.kenrockwell.com/tech/ebay/early-bidding.htm>>.

One instance of this is online auctions following the Vickrey sealed-bid auction system. In a Vickrey sealed-bid auction, bidders submit written bids without knowing the bid of other bidders; the one who submits the highest bid wins. However, the price paid will be that of the second highest bid. This kind of bidding can be disadvantageous to buyers as they may bid higher than the true market value or the demand price. This kind of bidding is prone to shill bidding as it lacks transparency. Therefore, e-consumers may not be conversant with the auction mechanism used and may face further uncertainties such as paying higher prices. The result may be a loss of trust in online auctions.

Moreover, in offering increased opportunities to consumers, e-auctioneers or sellers in online auctions may be importing products from sellers abroad with little or no liability imposed on the e-auctioneers. Consumers need to be informed regarding the nature of the transactions they are entering into, including information about the source of the product and the limitations involved in cases where these products are cross border-shipped products.

### **(c) Problems in Online Social Network Sales**

The popularity of online commercial transactions through social networks in Tanzania<sup>70</sup> is partly due to the easy and free access of these forums. People can offer products for sale, as well as advertise and engage in other interactions without any cost or charge. Moreover, the rapid growth and acceptance of social networking in Africa, and particularly in Tanzania may be closely related to the African way of life, where social networking is a definitive feature of the culture. This social networking is embedded in the African 'Ubuntu' philosophy of life that translates to, 'you are because we are'.<sup>71</sup> It reflects community life and a way of supporting each other.

The popularity of sales in online social networks is not restricted to Tanzania. A US e-commerce spending report, undertaken by comScore, a marketing research company

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<sup>70</sup> Michuzi, above n 52.

<sup>71</sup> Clifford G Christians, 'Ubuntu and Communitarianism in Media Ethics' (2004) 25 *African Journalism Studies* 235, 241  
<<http://www.tandfonline.com/doi/abs/10.1080/02560054.2004.9653296#.VCjvJH8oRm4>>.

specialising in the digital world, revealed that regular Facebook and Twitter users purchase more online than other internet users.<sup>72</sup>

Different styles and feature mechanisms are used in these social networks. Some social networks have classified sections, where members can post items for sale, adding images of the products, and listing seller information such as a phone number or email address.<sup>73</sup> The price of these items may be fixed or negotiable, depending on the seller. Payment is most commonly through cash on delivery, or by mobile phone money transfer.

Another style of selling in some of the social forums is through posting an advertisement for goods for sale, in a similar way to posting comments and messages. Members viewing the blog or forums see the advertisements when they open the web page to read posts on the forum.<sup>74</sup>

A range of different products are offered for sale on these social online networks such as, John Deere tractors, houses, cars, clothing and TVs.<sup>75</sup> The majority of sales are individual or private sales although businesses can also post products.

Posting products for sale in social networks attracts user comments; comments on the fairness of the price, the genuineness, or legality of the product or even the genuineness of the seller. As a result, consumers have gained greater trust in sales through social networks because the sellers or products offered are easily scrutinised by community members and the reliability of sellers and products is easily established

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<sup>72</sup> Ecommerce Junkie, *Data Confirms that Social Networking Users Spend More Online* (9 June 2010) <<https://ecommercejunkie.wordpress.com/2010/06/09/data-confirms-that-social-networking-users-spend-more-online/>>.

<sup>73</sup> See Jamii Forums <<http://www.jamiiforums.com/matangazo-madogomadogo/>> ; DMK Real Estate Tanzania Properties <<http://dmkrealestate-tanzaniaproperties.blogspot.com>>; Magari Poa Blogspot <<http://magaribeipoa.blogspot.com/>>; accessed 26/09/2014.

<sup>74</sup> See <<http://issamichuzi.blogspot.com/2010/09/toyota-cresta-inauzwa.html>> accessed 25 September 2010; <<http://issamichuzi.blogspot.com/2010/10/tangazonymba-inauzwa-kunduchi-block-f.html>> accessed 25 September 2010; <<http://8020fashions.blogspot.com>> accessed 26 September 2014; <<http://www.sherianamavazi.blogspot.com/>> accessed 25 September 2014.

<sup>75</sup> See <<http://www.jamiiforums.com/matangazo-madogomadogo/75530-matrekta-mapya-ya-john-deere.html>>; <<http://issamichuzi.blogspot.com/2010/10/tangazonymba-inauzwa-kunduchi-block-f.html>>; <<http://dmkrealestate-tanzaniaproperties.blogspot.com/>>; <<http://magaribeipoa.blogspot.com/>>; <<http://www.sherianamavazi.blogspot.com/>>; <<http://8020fashions.blogspot.com/>>; <<http://www.jamiiforums.com/matangazo-madogomadogo/76595-samsung-tv-29-inauzwa.html>>; accessed 26 September 2014.

by network users.

The majority of online social networks in Tanzania are free and accessible to anyone in or outside the country. Tanzanians abroad can post items for sale from wherever they are and ship the products once they find a buyer.

Some of these social networks are sponsored by big companies in Tanzania, for example, mobile phone companies like Vodacom, and banks.<sup>76</sup> Sponsorship supports the social networks, and does not necessarily mean the sponsors are involved further. However, these sponsorships create credibility of the social networks being sponsored and raise trust of its users. Several uncertainties arise when transacting through social networks and forums. These uncertainties will be discussed below.

#### (i) Self and public regulation

The social networks in Tanzania face limited self-regulation. It is normal to have a moderator, facilitator or forum owner to oversee forum operations. However, this is limited to facilitating membership and posts. Moderators may control offensive or aggressive posts in a forum so as to avoid alienating the users. In some networks, however, there is less of this moderator facilitation. Moreover, most social networks do not require one to be a member to read and posts content online. This is the case in most existing blogs. Clearly, an environment with little regulation exposes users to violations and little protection should a dispute arise. The obligations of social network owners and their responsibility for sales taking place on their social forums need to be examined. At the same time, care should be taken that these responsibilities are not too onerous and curtail the purpose and popularity of social networking sites.

Similarly, questions about public regulation of social network sales need to be addressed. Questions arise when it comes to regulating social network forums, especially where both sellers and buyers are consumers and both are in need of protection. Questions as to the extent of the protection, and who to protect need to be

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<sup>76</sup> For example Issa Michuzi blogspot <<http://issamichuzi.blogspot.com/>>; <<http://fullshangwe.blogspot.com/>>; <<http://8020fashions.blogspot.com/>>; accessed September 2014.

answered. The rationale of consumer protection, which is the unequal bargaining power, may need to be considered in a different light; especially in environment such as in social network sales where the subjects in question may possess equal bargaining powers. Similarly, there is a need to consider whether such relations should be regulated by contract law principles and the appropriateness of doing so, in order to give a clear view of the regulation needed in C2C online sales in social forums and networks.<sup>77</sup>

## (ii) Business involvement

Online social network selling is not only popular among individuals in Tanzania but also among businesses. Businesses post their products for sale in blogs and social forums, as this is the easiest way of attracting online buyers. Consequently, the consumers can easily be confused as to whether they are trading with individual sellers or businesses.

Moreover, these social networks are also potential sites for business advertising. The popular and effective way of advertising on these social networks is through word of mouth among members of a particular network. Word of mouth is among one of the most reliable ways of authenticating genuine businesses in social networks. Highly experienced buyers can differentiate scams and frauds from genuine sale items, and hence advise others in case they are suspicious of offered products. Therefore, if this procedure is abused by a powerful business, who can find a way to manipulate an influential member of a certain network, not only are individual consumers put at risk, but also the future of online sales in Tanzania.

## (iii) Transaction records

Accessible records of advertisements and sales in social networks are also important for consumer welfare. As blogs and social forums are individually owned, pages and posts can easily disappear. Owners may decide to delete a particular post or page, or

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<sup>77</sup> Regulation of C2C online sales in social networks and forums poses more challenges than in other C2C online transactions as they lack key players whose role it is to regulate these sales. This is unlike online auctions, where the e-auctioneer's main responsibility is to regulate and facilitate transactions.

abandon a forum. It is essential to ensure that records of advertisements and sales are accessible to parties for a certain period of time.

Online social network sales can be considered to be the revolution of online transactions in Tanzania. There are more people engaging in these social forums than there are in online web shops in Tanzania.<sup>78</sup> It is important to ensure buyer welfare and fair play through building trust as these social network sales are the backbone of online transactions and general e-commerce in Tanzania. If trust is not built while consumers are transacting with each other, then it will be harder for consumers to trust online transactions with businesses, and hence, harder to foster e-commerce in the country.

### 3.3 PROBLEMS ARISING DURING THE PERFORMANCE PHASE OF ONLINE CONSUMER TRANSACTIONS

#### **3.3.1 *Business to consumer (B2C) online transactions***

##### **(a) Introduction**

One of the problems consumers face while transacting online is the failure in the performance of a contract. In the discussion below, several difficulties arising from non-performance will be highlighted.

##### **(b) Concerning Issues**

###### **(i) Non-delivery and late delivery**

Among the problems that consumers face during the performance phase of online transactions is non-delivery or late delivery of items after the conclusion of a sale.

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<sup>78</sup> Michuzi, above n 52.

The consequences of non-delivery of items are more complex than late delivery. Non-delivery of items may be due to loss while being shipped or fraudulent actions.<sup>79</sup> In the case of non-delivery due to loss, questions such as who should bear the loss, whether the buyer should be refunded or the product be replaced arise.

There are several situations in Tanzania that create difficulties in considering these questions. First of all, there is very little usage of street or house numbers in the country.<sup>80</sup> It is argued that ‘in Tanzania, you cannot tell systematically where someone lives.’<sup>81</sup> Even though there may be plot numbers, and some houses in cities have house numbers, the documentation of these numbers and street planning makes the usage of physical address and physical delivery of goods very challenging. Consequently, postal services, such as post office boxes and other courier systems which receive and store goods for customers are heavily relied on as a delivery method.

Tanzanian postal services face the challenge of connecting a sparsely settled population across a vast country. There is also the challenge of matching and improving the provision of services for a rapidly growing urban population.<sup>82</sup> Stories of lost items after they are delivered to the post office are frequent.<sup>83</sup> The postal services in Tanzania have been declining over the years. It is only recently, that they have started to pick up. This decline is partly due to the growth in technology, and internet communication.<sup>84</sup> However, it is argued that with the introduction of distance selling, postal services are back in demand again. This is clearly seen in Figure 3.9 which shows statistics for Tanzanian postal services from 2000 – 2011. They illustrate a major increase of Tanzanian postal services in letter delivery services,

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<sup>79</sup> For the discussion on fraud, please refer section 3.2.1. (b)(i).

<sup>80</sup> At the moment there is no use of street number. It is only since 2012 that the government started a project of assigning street addresses and postal codes, which is yet to be completed. See Tanzania Communication regulatory Authority (TCRA), *Publication of Postcode List* (2014) <<https://www.tcra.go.tz/index.php/publication-and-statistics/postcode-list>>; Deodatus Balile, ‘Tanzania to Assign Street Addresses’, *Sabahi* (online), 6 June 2012 <[http://sabahionline.com/en\\_GB/articles/hoa/articles/features/2012/06/06/feature-02](http://sabahionline.com/en_GB/articles/hoa/articles/features/2012/06/06/feature-02)>.

<sup>81</sup> Balile, above n 80.

<sup>82</sup> World Business Council for Sustainable Development (WBCSD), *Mobility for Development, Tanzania Case Study* (2007), 25 <<http://oldwww.wbcd.org/templates/TemplateWBCSD5/layout.asp?type=p&MenuId=MTYzMw&doOpen=1&ClickMenu=LeftMenu>>.

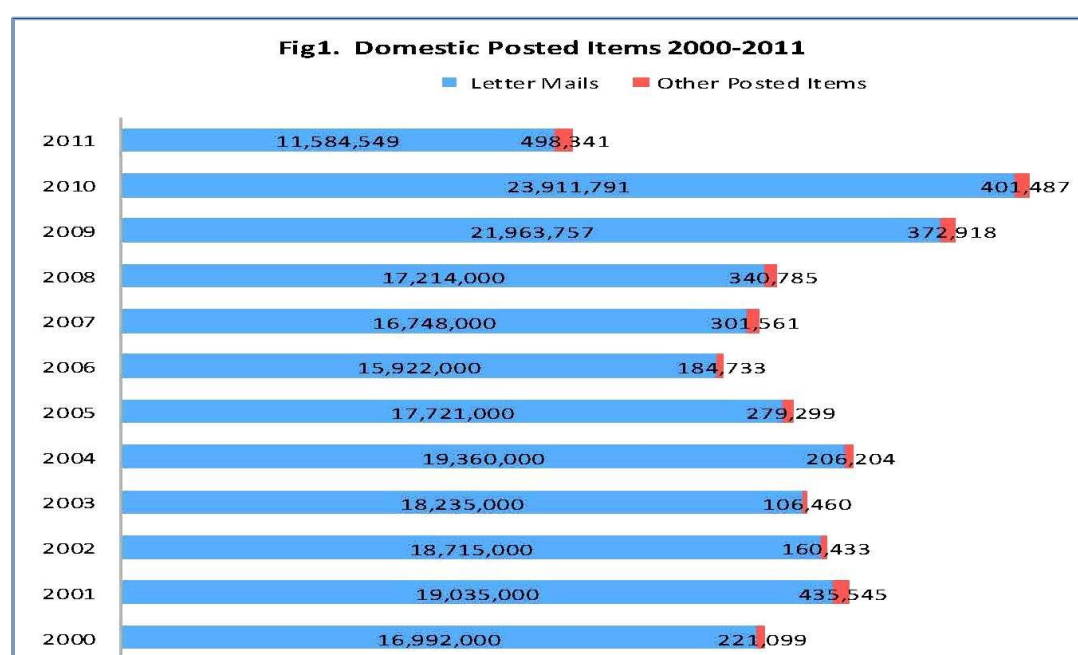
<sup>83</sup> On file with author.

<sup>84</sup> WBCSD, above n 82, 48.

especially from 2009 – 2010, however, parcel delivery numbers remain low.

There is a lot of improvising in the delivery system where interregional transportation services have been used instead of post offices. It is common practise for letters, parcels and even money to be sent through private passenger buses travelling up country.<sup>85</sup> This is a faster and more reliable delivery system than the public services. The statistics demonstrate that the passenger buses and other courier services are used more than the post services in Tanzania. Consumers in Tanzania use the passenger bus system because it is efficient. However, since it is an informal system, it is completely determined by the service providers, and consumers are helpless in cases of non-delivery or damaged goods.

**Figure 3.9 Domestic Posted Items Through Tanzania Postal Corporation, 2000 – 2011**



Source: Tanzania Communications Regulatory Authority (TCRA)<sup>86</sup>

Similarly, uncertainties arise from late delivery of goods bought online. Whereas

<sup>85</sup> See for instance, Scandinavia Express Service, a private bus company in Tanzania, offering services for money transfers, small packages, cargo, baggage and other transportation both nationally and internationally through its buses <<http://www.scandinaviagroup.com>> accessed 20 September 2014.

<sup>86</sup> Tanzania Communications Regulatory Authority (TCRA), *Statistics: Tanzania Postal and Courier Services* (2012) <<https://www.tcra.go.tz/index.php/publication-and-statistics/statistics>>.



sellers should be obligated to ship goods in reasonable time, other factors causing late delivery in Tanzania should be considered. Consumers living in regional towns may experience late delivery due to poor infrastructure and other socio-economic factors facing Tanzania.

However, late delivery of products may also occur on purpose so as to entice consumers to pay more for fast delivery services,<sup>87</sup> or it may simply be due to late despatch from sellers. Late delivery brings uncertainty to consumers, especially where no late delivery notice or any other information concerning the shipment is provided to consumers.

#### (ii) Partial sale or delivery

Another problem is that of partial sale or delivery. This is most likely to occur where products bought are delivered online through downloads or emailing. A partial delivery may be a result of system failure such as power failure, network failure due to low computer specifications or certain software requirements. This failure becomes a problem if buyers are not allowed to download the same products again.

Partial sale may also occur in electronic sale of software where there is only partial download of software, unless the buyer subscribes to other services or purchases facilitating software. Similar circumstance can occur when online sellers sell software which requires another specialised software or hardware in order to operate, without alerting consumers. Another example of a partial sale occurs when a product is provided with a trial licence or a freeware version, instead of a full product licence.

#### (iii) Interoperability

Interoperability is a major problem for electronic delivery in Tanzania. Interoperability is referred to here as the ability of electronic goods delivered being

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<sup>87</sup> This is reflected in transactions which take two weeks to post an item in the same town if normal shipping charges are paid, however, it takes a day or two where express shipping charges have been made. For instance see <<http://www.kivuko.com/cart.php>> accessed 26 September 2014.

able to work with different receiving tools. It is a common practice for online delivered products such as software to be limited to one receiving system only such as computer or mobile device. This is problematic in Tanzania where the majority of consumers depend on public internet services. This may happen when a prompt installation is required while downloading a product to ensure that the software, music or any goods in question is limited to one device. Whereas, there may not be simple answers with international transactions, it is essential that local services should give consumers sufficient opportunity to transfer the said products to the devices of their choices.

#### (iv) After sale support

Consumers are also faced with uncertainties about after sale support, return of goods and refunds. Geographical isolation could mean that consumers do not receive the technical support that is promised when buying a product. This should be made clear at the time of purchase, but is often overlooked by the seller. If the limits to technical support have not been presented during the purchase, consumers may believe that such services are available and they could be encouraged to buy products which they wouldn't otherwise have if such information had been made clear during the sale.

Lack of support may also occur where consumers have to incur costs in order to receive such support. This may include requiring consumers to make expensive calls to customer support centres in order to obtain assistance with problems. Similarly, consumers may not be able to return goods or get refunds due to geographical zone limitations or where the costs of returning the products are too high.<sup>88</sup>

#### (v) Personal information handling

Online transactions require e-consumers to provide a great deal of personal

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<sup>88</sup> For instance, customers who buy goods from Kivuko are informed that their products will be returned overseas, in particular to the US or UK. This cost may discourage consumers from returning the products. See <<http://www.kivuko.com/pages/Shipping-%26>Returns.html>> accessed 26 September 2014.

information, which if misused or mishandled by businesses or accessed by criminals and fraudsters, may cause harm to consumers.

There is easy access to personal information that is provided in different online and other electronic services in Tanzania. It is common practice to find paper bags made out of recycled/reused papers containing confidential information. These paper bags are popularly used by street vendors and shops.<sup>89</sup> This is evidence that the standards of personal information handling in Tanzania are poor, and consumer rights are being breached. Regulations to stop these breaches need to be put in place in order to protect consumers.

Personal information details are also readily available online. A search in Google or any other search engine may easily give all the information criminals require to commit a crime. Consumers' online activities can easily be monitored and traced. Their sensitive data including physical addresses and credit cards details can easily be captured. Their communication with other people online can easily be intruded.

Whereas secure data protection may need complex systems which may be costly if not unaffordable for Tanzanian local sellers, simple measures such as encrypting a website and deleting cookies<sup>90</sup> can render much protection to e-consumers who transact electronically. There should be a minimum requirement for the storing of e-consumer information in online transactions.

Furthermore, there should be a set of standards about what information can be collected by online sellers and consumers should be made aware of this data collection.

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<sup>89</sup>See Blogger, 'Technological Opinions of Judge Sotomayer: Comments' on *Cyber Law: Focus on Tanzania* (2 June 2009) <<https://www.blogger.com/comment.g?blogID=9055070466489395691&postID=5341209886939188602>>.

<sup>90</sup> Some of these features may be useful, however, consumers should be informed of their use and be given the opportunity to opt in or out. An example would be the use of cookies and web bugs by web site operators that captures information which can identify and monitor their customers' activities, allowing them to provide targeted services to match their preferences. Moreover, this information should be securely kept so as to safeguard consumer interests.

### **3.3.2 Diverging issues in consumer to consumer (C2C) online transactions**

It should be noted that similar issues discussed previously in B2C e-commerce also occur in C2C e-commerce. However, there are some contextual differences which can be significant when adjudicating these transactions before the courts. For instance, it is common for local businesses in Tanzania to use their own delivery systems;<sup>91</sup> this is unlikely in C2C transactions where individual sellers may not have the resources to deliver the goods themselves. Consequently, the circumstances of late delivery or loss will be different between the two types of transactions.

Similarly, in partial sale or delivery, the circumstances of the transaction will be different between B2C online transactions and C2C online transactions. What needs to be considered particularly in C2C online transactions is whether the buyer understood what they were buying. This is because individual sellers might be selling products they bought from businesses, or second hand products from their own belongings; and hence have little control over the products. Therefore, questions and remedies of partial sale in C2C online transactions will be different from those of B2C online transactions. Consideration of issues such as defective products and refusal to sell will depend on what type of transaction took place. For instance, individual sellers in C2C online transactions may not have the ability to offer a warranty or replace a product; refunds and reimbursements may also need to be treated differently in these types of transactions.<sup>92</sup>

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<sup>91</sup> See 3.2.2 (b) (i) on the role and liabilities of the intermediaries above.

<sup>92</sup> This discussion and other issues concerning C2C online transactions is discussed further in Chapter Six when analysing the problems and discussing possible solutions.

### 3.4 PROBLEMS ARISING IN PAYMENTS FOR ONLINE CONSUMER TRANSACTIONS

#### 3.4.1 Business to consumer (B2C) online transactions

##### (a) Introduction

An area that raises uncertainties for e-consumers in Tanzania is payment. The payment system in Tanzania is clouded by many challenges. Consumers engage in a combination of both online and offline methods of payment for e-transactions. These include money orders facilities such as Western Union, bank transfers, and payments of cash on delivery or collection, as well as credit card and debit card services.

The recent introduction of mobile electronic money transfer systems has been enthusiastically adopted, as these services provide an easy method of electronic payment.<sup>93</sup> A lack of easily accessible, less expensive online payment systems has led e-consumers to resort to mobile phone payment systems. These payments facilities have not only seen the increase of online transactions, but also led to the integration of e-commerce and m-commerce in Tanzania.<sup>94</sup>

Together with the presence of mobile phone money transfer, peer to peer online payment systems facilitating payments in online transactions has emerged. A good example of this is the Pesapal service, which works like PayPal under the East Africa electronic commerce arena.<sup>95</sup> Pesapal facilitates online transactions by allowing payments and money transfers to be made through the internet over several countries

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<sup>93</sup> 'Vodacom Rolls Out Online Goods Delivery, Payment Systems', *Tanzania Daily News* (online), 15 April 2010 <<http://allafrica.com/stories/201004150965.html>>; Kiishweko, above n 8.

<sup>94</sup> Kiishweko, above n 8.

<sup>95</sup> See <<https://www.pesapal.com/home/personalindex>>; similar services are iPay Africa <<http://www.ipayafrica.com/>>; MobiPay Kenya <<http://mobipay.co.ke/>>; E-fulusi Tanzania <<http://www.itu.int/tlc/WORLD2009/catalogue/entries/1646.html>>; accessed 30 September 2014; see Moses Kemibaro, 'E-Commerce on a Steady Rise in Kenya', *The East African* (online), 8 February 2010 <<http://www.theeastafrican.co.ke/business/-/2560/856868/-/view/printVersion/-/btv5j0/-/index.html>>; Russell Southwood, 'M-Money - New Competitor Services Throw Their Hats into the Ring in Ghana and Tanzania', *All Africa* (online), 2 June 2008 <<http://allafrica.com/stories/200806020870.html>>.

in Africa including Kenya, Uganda, Tanzania, Zimbabwe, Malawi and Rwanda.<sup>96</sup> This means online merchants can accept mobile phone payments from any mobile phone provider regardless of the service provider they use or country in which they reside.<sup>97</sup> Other similar services are also present.<sup>98</sup>

With all these payment systems and services there arise several challenges for consumers, which are discussed below.

## **(b) Concerning Issues**

### **(i) Involvement of multi-intermediaries**

One notable feature of payments for online commerce in Tanzania is the involvement of other parties who have to facilitate the payments. Electronic payments are made independently through a third party who does not represent the seller or the buyer. For instance, electronic payments with mobile electronic fund transfers, and payments made through Western Union and other money order facilities, are facilitated by mobile phone operators or other payment facilitators independently. Several uncertainties may arise in such an interrelationship.

First, as the providers of these systems work independently, there is no coordination of activities, and hence, little payment evidence and recording of transactions. In the case of disputes, e-consumers may have difficulties proving that payments were actually made. As the payment facilitators are separate entities, records of payments will be separate, and may even contain different information. In the case of money orders, e-consumers may have payment documents, such as a money transfer, but there is little likelihood that these documents will provide details of the transaction

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<sup>96</sup> See Pesapal, 'PesaPal Payment Options' on *Pesapal Blog Pal* (26 September 2013) <<http://blog.pesapal.com/pesapal-payment-options/>>.

<sup>97</sup> Ibid. Mobile phone payments in Tanzania are currently restricted to country level and to customers of the same network only. See <<http://www.vodacom.co.tz/docs/docredir.asp?docid=3547>> accessed 30 September 2014.

<sup>98</sup> See iPay Africa <<http://www.ipayafrica.com/>>; MobiPay Kenya <<http://mobipay.co.ke/>>; E-fulusi Tanzania <<http://www.itu.int/tlc/WORLD2009/catalogue/entries/1646.html>>; accessed 30 September 2014.

paid for. In instances where the seller trades in a different name, more uncertainties may arise.

This is complicated further when e-consumers use mobile phone facilities, such as M-pesa, Zap and Z-pesa. E-consumers have little access to payment records. For instance, the sender may receive a confirmation text message, informing them that the transfer has gone through; however, few details of the transaction are contained in this message. No other information or confirmation is offered. Moreover, it is uncertain whether the transaction information will be readily available to the sender at any point in the future.

Secondly, due to the independent nature of the payment facilitators in these transactions, it is uncertain that these payment facilitators will be able to offer e-consumers transaction rights, such as refunds and cancellations, when needed. Payment facilitators are not concerned with refunds due to non-delivery and other disagreements, as their transaction is independent of the transaction outcome between the buyer and seller.

Facilitation of refunds may also not be realistic due to different operating systems of mobile phone companies. As these companies are not working with any online business, their facilities and priorities do not address online commerce payment needs.

## (ii) Extra and high transaction costs

It may also be argued that the current methods of payment pose disadvantages to e-consumers as they are faced with extra transactional costs due to payment fees. E-consumers sending money through mobile phone electronic fund transfer have to pay a certain fee for sending the money. The receiver of such payments also incurs these fees.<sup>99</sup> As it is a common procedure for businesses to charge buyers handling fees, there is a high possibility the burden of paying these fees might be transferred to e-

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<sup>99</sup> For example Vodafone M-PESA Customer Tariffs  
<[https://www.vodacom.co.tz/mpesa/consumers/mpesa\\_tariffs](https://www.vodacom.co.tz/mpesa/consumers/mpesa_tariffs)>; Tigo Pesa Tariffs  
<<http://www.tigo.co.tz/tigo-pesa/services/tigo-pesa-tariffs>>; accessed 30 September 2014.

consumers. Furthermore, other companies let their agents decide on the mobile money transfer costs.<sup>100</sup> This creates lack of uniformity and uncertainty for e-consumers. Clear rules need to be set in order to foster e-consumer welfare.

### (iii) Insecure payment systems

There are several consumer concerns arising during payments phase of online transactions such as security concerns. The security issue arises in both online payment and mobile payment transactions. In online payments, the use of credit or debit cards is insecure. With considerable credit card fraud and irregularity on the internet, Tanzanian e-consumers can easily become victims.

Individual consumers are in no position to fight the fraudsters individually. Much assistance is needed from both sellers and financial institutions which are better positioned to curb fraudsters. They can use secure web systems, which will detect and prevent phishing or any kind of trapping of information, as well as control malicious hyperlinking or deep linking, and impose a secure protection policy for its users. However, this does not happen in Tanzania, where banks shift the burden of liability to their customers, even in cases where the bank is negligent.<sup>101</sup> Consequently, it is the customers of these banks that are deemed liable when their credit or debit cards are the subject of fraud.<sup>102</sup>

Similar situations arise among mobile phone users. Fraudsters target mobile phone users knowing that funds can easily be transferred through a click of a button. These mobile phone frauds range from simple messages claiming to be sent from customer care with information which, if followed, could result in a transfer of funds using a customer's mobile phone, to high tech techniques which involve false figures showing

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<sup>100</sup> Sarah Rotman, 'Mobile Banking in Tanzania: Zain's Zap', *CGAP* (online), 28 July 2009 <<http://technology.cgap.org/2009/07/28/mobile-banking-in-tanzania-zains-zap/>>.

<sup>101</sup> See the CRDB Bank, *General Terms and Conditions*, 2014, clause 4, 5, 16 <[http://www.google.com.au/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0CB8QFjAA&url=http%3A%2F%2Fwww.crdbbank.com%2Findex.php%3Foption%3Dcom\\_phocadownload%26view%3Dcategory%26download%3D53%3Ageneral-terms-and-conditions%26id%3D2%3Aaccount-forms%26Itemid%3D158&ei=tBe7VOTKMePdmAXO-IDwDA&usg=AFQjCNEIJHyjSb9OjmB1nXVY8OClyBRSgA&bvm=bv.83829542,d.dGY](http://www.google.com.au/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0CB8QFjAA&url=http%3A%2F%2Fwww.crdbbank.com%2Findex.php%3Foption%3Dcom_phocadownload%26view%3Dcategory%26download%3D53%3Ageneral-terms-and-conditions%26id%3D2%3Aaccount-forms%26Itemid%3D158&ei=tBe7VOTKMePdmAXO-IDwDA&usg=AFQjCNEIJHyjSb9OjmB1nXVY8OClyBRSgA&bvm=bv.83829542,d.dGY)>.

<sup>102</sup> This has been further revealed in social network discussions where credit card users have had this experience; on file with author.



in one's account.<sup>103</sup> These fraud activities are preventable if proper security measures are undertaken by mobile phone companies to protect their customers.

(iv) Insufficient assistance

Furthermore, consumers face problems during these transactions because they receive little assistance from payment service providers. There is little or no assistance in the case of input errors, sending payment to a wrong or non-existing number, refunds or cancellations. Consumers are offered 'use at your own risk' services with little or no customer protection.<sup>104</sup> Some of the service providers do inform customers that a transaction can be reversed in case of error; or that they offer particular services. However, these services are not available in practice.<sup>105</sup> The reality is that costumers get little assistance from service providers.<sup>106</sup> Customer care is difficult to access, and most of the time customers are not provided satisfactory assistance.<sup>107</sup> This seems to be a trend not only in Tanzania, but also in some other countries in East Africa, where the mobile operators are the same. This situation is reflected by one presenter who stated:

Customer care in East Africa is crap... the customer care is really moderate to say the least. Long waiting times, jammed toll free numbers, insufficient and incorrect replies etc. Typical issues include billing complaints (airtime never loaded or unclear tariffs), poor quality of service (undelivered SMS, poor voice quality, dropped calls), high failure rates of hardware (like promotional mobile phones). Further, few customers know about their consumer rights and

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<sup>103</sup> 'Really Bad Customer Care ... or A Really Good Scam!' on *Diasporadical* (18 August 2010) <<http://diasporadical.wordpress.com/2010/08/18/really-bad-customer-care-or-a-really-good-scam/>>.

<sup>104</sup> E-consumers who pay online using their credit and debit cards are faced with similar situations, as banks shift all the liabilities to their customers.

<sup>105</sup> See Jamii Forums <<http://www.jamiiforums.com/technology-and-science-forum/43940-blackberry-service-vodacom-vs-zain.html>> accessed 30 September 2014.

<sup>106</sup> Some of the consumers have been complaining that their service provider's customer care is like a lottery, moreover they charge for customer calls. See Jamii Forums <<http://www.jamiiforums.com/business-and-economic-forum/31745-tigo-customer-hotline-and-voicemail-print.html>> accessed 30 September 2014.

<sup>107</sup> Customers of mobile phone services have complained of the unavailable advertised services and offers, see Jamii Forums <<http://www.jamiiforums.com/habari-na-hoja-mchanganyiko/40467-vodacom-vipi-please-chew-what-you-can-bite.html>>; <<http://www.jamiiforums.com/jamii-intelligence/18853-wizi-wa-kampuni-za-simu-na-vinywaji-tanzania-10.html>> accessed 30 September 2014.

obligations resulting in a situation where end-users do not get value for money from operators and service providers... As the mobile industry is turning the ordinary citizen into a consumer, who gets more and more dependent on the network and available services, it becomes extremely important that the end-users know their rights and that there is some sort of body which protects the interests of consumers, alternatively that the consumers unite and put pressure on the operator when the service is bad.<sup>108</sup>

There are no regulations or laws regulating mobile phone electronic money transfers, consumer welfare is left to the mobile service providers who dictate the terms and conditions, and ground rules. The providers determine the charges and prices for these services. Issues, such as double charges and high prices may go unnoticed. Similarly, because online payment services, such as credit and debit cards, and the emerging peer to peer payment services, are not regulated, the system is generally controlled by the terms of each provider rather than by law. Online and mobile payments in Tanzania are a necessity as they do not complement the available payment systems, but rather fill the gap available due to the minimal availability of similar services. Consumers may be forced to use them as there are few other alternatives. This raises the need to ensure that such services are accessible and affordable to users.

E-consumers need a simple reliable mechanism that will enable them to stop payment in case of fraud, unauthorised use, error, or even the occurrence of a dispute.

### ***3.4.2 Diverging issues in consumer to consumer (C2C) online transactions***

Parties involved in C2C online transactions are faced with similar issues as those discussed for B2C online transactions. However, there are diverging aspects when it comes to providing solutions. This divergence is due to the nature of parties involved in these online transactions; consequently, different elements in these two transactions yield different results. For instance, where businesses can easily arrange payment

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<sup>108</sup> Johan Hellström, *The Use and Possibilities of M-Applications in East Africa* (2009) <[http://www.w3.org/2008/10/MW4D\\_WS/papers/hellstrom\\_mapps.pdf](http://www.w3.org/2008/10/MW4D_WS/papers/hellstrom_mapps.pdf)>.

systems with financial institutions for their businesses or opt for business accounts; this may not be the case with individual sellers. Such arrangements will be costly for individual sellers, who may only be involved in a one-time sale.

Consequently, the level of responsibility in payment transactions and services differ between C2C online transactions and B2C online transactions. Instances of this can be seen in payment fees during online payments, where payment fees charged by businesses may be low or non-existent. This is especially so where businesses have prior arrangements with financial services or operate business accounts; and hence may get certain incentives and subsidies. However, individual sellers in C2C transactions may be in a similar situation to consumers and both sellers and buyers may have to incur payment fees.

Furthermore, proximity between parties involved in payment transactions may differ depending on the type of online transaction. In B2C online transactions, buyers may not be dealing directly with the payment system providers. An example of this is where businesses have prior arrangements with financial services, and may not even be aware that such providers are used. However, in C2C online transactions, both buyers and sellers deal with a third party who is a financial service provider. These differences should be taken into consideration when regulating these two types of online transactions.<sup>109</sup>

### 3.5 PROBLEMS ARISING POST FORMATION IN ELECTRONIC CONSUMER TRANSACTIONS

#### ***3.5.1 Business to consumer (B2C) online transactions***

##### **(a) Introduction**

Among concerns for e-consumers after they have concluded online transactions is that

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<sup>109</sup> This discussion is discussed at length in Chapter Six where analysis of the problem and possible solutions are examined.

of dispute resolution. The existing redress framework in Tanzania does not adequately address online transactions and e-consumers cannot easily seek redress in case of grievances in online transactions.

There are several issues that e-consumers face when they seek redress. These include: difficulty in accessing justice for disputes caused by a lack of clear laws and principles governing disputes arising from online transactions; a lack of easy legal infrastructure to deal with disputes arising in online transactions; and ousting clauses which limit e-consumers redress options.

E-consumers are also faced with other concerns including the cross border nature of online transactions and the enforceability of judgements awarded in online disputes. These issues are discussed below. It is acknowledged that the area of online dispute resolution (ODR) is wide. For this reason, the discussion will be restricted to specific issues that e-consumers face in online transactions. The dispute resolution problems raised must be addressed in order to have effective online consumer protection.

## **(b) Concerning Issues**

### **(i) Accessibility**

Among the difficulties arising in seeking redress from online transactions is the access to redress. The current judicial system is not accessible to e-consumers who transact online. There are several factors leading to inaccessibility of redress to e-consumers. These factors are discussed below:

#### ***Absence of laws***

Access to justice is one important element in online consumer protection. This element is unsatisfactory in Tanzania due to the absence of specific laws enabling access to justice. There are no laws recognising e-transactions in general, and it is uncertain whether aggrieved e-consumers can successfully seek legal relief in the

available courts. There have not been any online transaction cases adjudicated in the Tanzanian jurisdiction,<sup>110</sup> nor have there been any e-commerce cases in general. There have been a small number of cases<sup>111</sup> raising matters on general issues relating to technology, mostly in the area of the admissibility of electronic evidence. The courts have been challenged in deciding these matters owing to a lack of appropriate laws addressing issues of information technology at large.<sup>112</sup>

This can clearly be seen in the case of *Trust Bank Tanzania Ltd v Le – Marsh Enterprises Ltd*,<sup>113</sup> where the court had to determine the admissibility of electronic records as primary evidence. The available laws at the time did not recognise electronic data as primary evidence. This question led to a landmark decision by the Commercial Court, declaring that electronic records can be admissible as first evidence in court. However, the rationale in arriving at this decision did not eliminate uncertainty as to the admissibility of electronic records for e-consumers. This is because, in this particular case, the electronic records, which were bank statements, were only admissible because they were part of the bankers' books. This position was later reflected in an amendment to evidence law to allow electronic evidence in cases of a criminal nature only.<sup>114</sup>

It is evident that e-consumers seeking justice in courts will be confronted by this barrier. Not only will they be faced with uncertainty in tendering electronic evidence,<sup>115</sup> but it is also uncertain that their electronic agreements will be recognised as valid agreements by the courts as there is an absence of laws validating, and giving

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<sup>110</sup> Court of Appeal, High Court and Commercial Court of Tanzania.

<sup>111</sup> *James Nduguru v Republic* (1984) TLR 284; *Abel v Republic* (1993) TLR 250; *Trust Bank Tanzania Ltd v Le – Marsh Enterprises Ltd* (Unreported, High Court of Tanzania Commercial Division, Commercial Case No 4, 2000); *Tanzania Bena Co Ltd v Bentash Holdings Ltd* (Unreported, High Court of Tanzania Commercial Division, Commercial Case No 71, 2002); *R v Zakayo Shungwa Mwashilindi* (unreported, High Court of Tanzania Mbeya Registry, Criminal Case No 35, 2005); *R v Nguza Vicking @ Babusea* (Unreported, Kisumu Resident Magistrate Court, Criminal Case No 555, 2003); *R v Prof Dr Cost Ricky Mahalu* (Unreported, Kisumu Resident Magistrates Court, Economic Case No 1, 2007).

<sup>112</sup> The only exception is a new law, known as the *Electronic and Postal Communication Act, 2010* [3 of 2010] which addresses issues arising in telecommunications, mainly issues of licensing electronic service providers.

<sup>113</sup> (Unreported, High Court of Tanzania Commercial Division, Commercial No 4, 2000).

<sup>114</sup> *The Evidence Act, 1967* [6 of 1967, CAP 6 R.E. 2002].

<sup>115</sup> *The Evidence Act, 1967* allows only original documents in written form to be admissible in court under the principle of the best evidence rule. Secondary evidence can only be admitted if it is corroborated by the primary evidence. The abovementioned case has clearly shown that electronic printouts or records are not permissible with the exception given in the judgement.

effect to, such e-transactions.

Furthermore, even though the courts in Tanzania are ready to adopt changes that occur as society progresses, they are also reluctant to make decisions that will have the effect of establishing new principles that have not been applied before; and hence it is most likely that unregulated matters, such as online commerce, will not be readily adjudicated without clear and specific laws guiding the courts.<sup>116</sup>

### ***Legal infrastructures***

The issue of accessibility also arises where e-consumers are unable to access justice due to the legal infrastructure. Aggrieved e-consumers in Tanzania can seek remedy only through civil cases in courts of law. This procedure is expensive, time-consuming and complex. E-consumers may need to be represented in courts. In most cases, consumer transactions involve only small sums of money, compared to the expenses consumers must incur in initiating legal proceedings in courts of law. Consequently, consumers are discouraged from seeking legal remedies in the courts. Some may not be able to do so because they cannot afford the costs. There is a need to establish a legally convenient, cost-effective, easily accessible, and transparent redress mechanism in order to foster e-commerce and protect e-consumers in Tanzania.<sup>117</sup>

There are legal aid services in the country;<sup>118</sup> however, most of these legal aid services assist in human rights and social justice cases. Domestic violence, violations of women and children's rights, probate and other similar social welfare cases are mostly being assisted through legal aid services in Tanzania. Moreover, the legal aid services assist people of low incomes who cannot afford legal services. It is most unlikely that cases with an economic or fee-generating nature will be represented with

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<sup>116</sup> This view was expressed in the High Court of Tanzania in the case of *Trust Bank Tanzania Ltd v Le – Marsh Enterprises Ltd* (Unreported, High Court of Tanzania Commercial Division, Commercial No 4, 2000), where the court expressed that it is preferable for the parliament to create rules that govern the new technology environment rather than waiting on courts to develop them.

<sup>117</sup> Further discussion on this will be carried out in Chapter Six where analysis of the problem and possible solutions are discussed.

<sup>118</sup> The Legal Aid Committee of the Faculty, University of Dar es salaam, the Tanzanian Women Lawyers' Association (TAWLA), the Tanzania Media Women's Association (TAMWA), the Women's Legal Aid Centre (WLAC), and the Legal and Human Rights Centre (LHRC).

legal aid. Hence, e-consumers seeking refunds, or any other commercial remedies may find difficulties in receiving legal aid.

Furthermore, some of the available legal aid services do not represent an individual directly in court but rather offer legal advice, assist with legal drafting and offer direction on how to handle a particular case. Legal aid organisations in Tanzania face financial and resource constraints, have limited capacity of presenting clients on, and can only assist in a few cases. The situation with legal aid is the same regarding pro bono services offered by practising law advocates offer in the country; and hence their services are limited.

Apart from legal services, there is a consumer protection non-governmental organisation (NGO) in the country known as the Tanzania Consumer Advocacy Society (TCAS). This society is in its infancy stage and at the moment deals with advocacy of general consumer protection issues. It does not act on individual complaints or get involved in legal initiatives through the courts.

### ***Ousting clauses***

Issues of accessibility also arise where consumers are required to seek justice in a certain court and jurisdiction. This is done through a jurisdictional or an arbitration clause provided by online businesses. For instance, a local website operating in Tanzania may require all litigation to be initiated in a foreign jurisdiction.<sup>119</sup> This has the effect of guaranteeing that e-consumers in Tanzania will not be able to participate effectively in such litigation due to various barriers, including finances, time, lack of knowledge, lack of representation and so forth. There is a need to ensure that the redress mechanisms enacted by businesses are accessible, efficient, effective, fair and independent.

Moreover, e-consumers need to be clearly informed about the laws governing their contracts and the redress options they will have to follow in the case of a dispute. It is most unlikely that e-consumers who enter into certain websites for the purpose of

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<sup>119</sup> See Kivuko <<http://www.kivuko.com/pages/Terms-of-Use.html>> accessed 30 September 2014.

purchasing products or services will look for redress information. Therefore, efforts should be taken to bring such information to the attention of the e-consumers when they visit a particular website.<sup>120</sup>

## (ii) Multi-jurisdiction transactions

One feature of online commerce is cross border transactions. E-consumers may be involved in a transaction in which the seller resides in another jurisdiction. This creates uncertainties as to the place and the laws that may be used in the case of litigation. The situation is further complicated due to the absence of laws governing foreign disputes. The available laws only recognise disputes arising within the country, and it is uncertain whether cross border disputes can be adjudicated in Tanzania.

In deciding disputes in the offline world, establishing physical place is a key element. Several questions such as the place where the contract was formed and the place where a breach occurred need to be answered in order to determine the applicable laws governing a dispute. These questions cannot be answered readily in the online world, due to the borderless nature of the internet. Jurisdictions must determine the answers to these questions. In some instances, available international laws governing such matters need to be adopted. There have been neither efforts of dealing with these matters in Tanzania, nor adoption of any international laws governing cross border disputes, leaving local e-consumers uncertain when facing cross border transactions. This is complicated further by the lack of local laws regulating online commerce in Tanzania.

## (iii) Enforceability

The issue of enforceability is important when deciding e-consumer disputes. It is essential that e-consumers are able to enforce judgements granted by courts. Inability to enforce judgements not only denies e-consumers the right to justice but also undermines efforts to protect them at large. It is uncertain at the moment whether an

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<sup>120</sup> See Chapter Six for further discussion.



aggrieved Tanzanian e-consumer can enforce a judgement against a seller who is in another jurisdiction.

### ***3.5.2 Contextual differences in consumer to consumer (C2C) online transactions***

As pointed out previously, similar jurisdiction issues arising in B2C online commerce also arise in the C2C context. However, the differences in context must be taken into account when providing solutions for e-consumers transacting online, as their solutions are different.

An instance of contextual difference can be seen in jurisdiction issues; whereas jurisdiction concerns over cross border transactions arises in both B2C and C2C online transactions the context is different. For instance the involvement of intermediaries in C2C online transactions where three different jurisdictions are involved, due to the fact that the seller, the website owner\operator and the buyer might be in different jurisdictions, and hence, it becomes necessary to consider such scenarios when discussing e-consumer concerns.

Consumer protection principles can be easily applied to B2C online transactions, but this is not the case with C2C online transactions. Questions as how to regulate the relation between parties involved in such transactions need to be answered. As both parties are consumers, it is not certain whether principles of consumer protection can be applied without bringing any harm to one side; or whether such relations can be regulated under principles of contract law without prejudicing the welfare of e-consumers.

## CHAPTER FOUR

### 4. PROBLEMS ARISING IN MOBILE COMMERCE CONSUMER TRANSACTIONS

#### 4.1 INTRODUCTION

Protection of electronic consumers (e-consumers) in Tanzania is complex due to the nature of electronic commerce (e-commerce) which is integrated with mobile commerce (m-commerce). This is mainly due to the fact that mobile phones have penetrated throughout Tanzania, unlike internet services, which can only be accessed in some parts. Mobile phone services have spread throughout the country including into rural areas; so has the mobile money service which can be accessed by any mobile phone customers (see Figure 4.1 at page 139). Consequently, the majority of e-commerce transactions depend on mobile phone payments.<sup>1</sup> As a result, unique features of e-commerce integrated with m-commerce emerge.

The presence of mobile commerce in Tanzania is much reflected back to ecommerce, one can even argue that the two are interwoven. Internet access in Tanzania is almost exclusively through mobiles; fixed lines connected to homes hardly exist.<sup>2</sup> Apart from this integration between e-commerce and m-commerce in Tanzania, it is also common practice to exclusively use mobiles for e-commerce; mobile phones customers start and conclude transactions using their mobile devices.<sup>3</sup> Combined, they form distinctive e-consumer and m-consumer concerns.

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<sup>1</sup> Paygate, *News: Pay for Goods and Services Online Using MPESA* (26 February 2013) <<https://www.paygate.co.za/content.php?paygatenews&articleid=195>>.

<sup>2</sup> Joe Boyle, 'Tanzania's Invisible Web Revolution', *BBC News* (online), 2 October 2012 <<http://www.bbc.co.uk/news/world-africa-19451044>>.

<sup>3</sup> According to a survey conducted in 2012 by Intermedia, which aimed to track the uptake, use and market potential of mobile money in Tanzania, 21% of Vodacom M-Pesa users and 12% of users of both Airtel Money and Tigo Pesa use their accounts for business transactions, primarily to buy inventory and receive payments for goods and services. See Intermedia, *Mobile Money in Tanzania: Use, Barriers and Opportunities* (The Financial Inclusion Tracker Surveys Project) February 2013 <[http://www.intermedia.org/wp-content/uploads/FITS\\_Tanzania\\_FullReport\\_final.pdf](http://www.intermedia.org/wp-content/uploads/FITS_Tanzania_FullReport_final.pdf)>. Vodacom M-Pesa, Tigo Pesa and Airtel Money are m-money services provided by the mobile phone companies of the same name in Tanzania.

Some of the m-commerce concerns are similar to those arising in e-commerce; however, the impact and effect vary. This is due to the nature of m-commerce where consumers use smaller devices with smaller screens, resulting in: smaller, cramped and compacted words; less information which can be accommodated on mobile phone devices; ; less information which can be accommodated on mobile phone devices; fewer multimedia facilities (limited file types, graphics, transfer capacity, limited functionality); and a distracting environment given the devices used for m-commerce are also used for communication and other activities possibly at the same time and involves all mobile consumers, even where they have not intended to engage in m-commerce. Due to the nature and features mentioned above such as small and compact devices, it is much easier to make mistakes while using m-commerce devices than when dealing with bigger devices such as a computer.

These differences are heightened due to cultural and social practices associated with mobile phone uses in Tanzania. For example, mobile phones often become a family utility or even a public one, and hence encompass both public and private nature.<sup>4</sup> It is not unusual for one household to share a mobile phone within the household or with their neighbours. This is even truer in rural areas where cultural norms are strongly practised (see Figures 4.2 and 4.3 at page 140). This situation is described further in a study undertaken by Vodafone, where it states that the perception of ownership of mobile phones in Tanzania is different from that in South Africa.<sup>5</sup> Respondents who owned a mobile phone often considered it a household asset rather than a personal or individual one.<sup>6</sup> The survey found there was a higher proportion of users of mobile phone services as opposed to owners of mobile phones in Tanzania compared to South Africa, which suggests a greater degree of ‘sharing’ of mobiles in Tanzania than in South Africa.<sup>7</sup>

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<sup>4</sup> In Tanzanian social-cultural practice, similar to other African countries; mobile phones are publicly accessed, either through sharing between friends and family or through calling centres and mobile phone pay booths. For further explanation on cultural practise and mobile phones, see Nikhilesh Dholakia and Nir Kshetri, ‘Mobile Commerce as a Solution to the Global Digital Divide: Selected Cases of e-Development’ (2005) <<http://ssrn.com/abstract=847184>>.

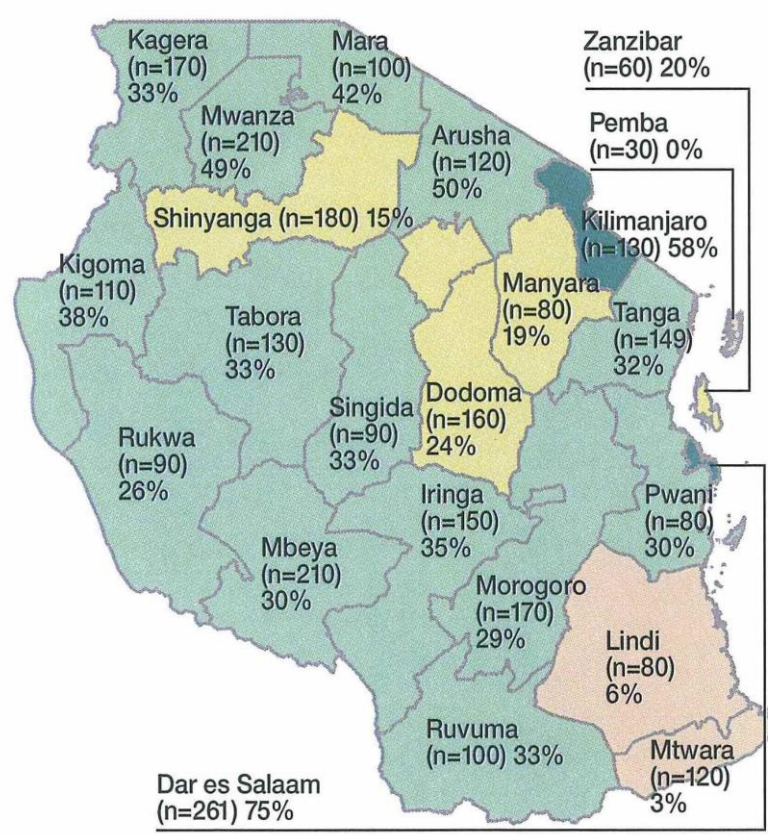
<sup>5</sup> Vodafone, *Africa: The Impact of Mobile Phones. Moving the Debate Forward* (Vodafone Policy Papers Series No 2, 2005).

<sup>6</sup> Ibid.

<sup>7</sup> Ibid.

Mobile phone usage in East Africa is characterised by innovations such as unconventional ownership models (shared handsets), decentralised payment plans (prepaid subscribers) and improvised use of the shared village phone.<sup>8</sup> These innovations are among the reasons that m-commerce and e-commerce have distinctive and unique features, particularly at a national level where each country has adopted mobile phone usage and the internet in accordance with their social and cultural influences.

**Figure 4.1 The Widespread Use of Mobile Money in Tanzania**



% Mobile Money Users:  
 0%–10% 11%–25% 26%–50% 51%–75%

Source: InterMedia FITS study of households in Tanzania, April–May 2012; N=2,980.

Source: Intermedia<sup>9</sup>

<sup>8</sup> Johan Hellström, *The Use and Possibilities of M-Applications in East Africa* (2009) <[http://www.w3.org/2008/10/MW4D\\_WS/papers/hellstrom\\_mapps.pdf](http://www.w3.org/2008/10/MW4D_WS/papers/hellstrom_mapps.pdf)>.

<sup>9</sup> Intermedia, *Mobile Money in Tanzania: Use, Barriers and Opportunities* (The Financial Inclusion Tracker Surveys Project) February 2013 <[http://www.intermedia.org/wp-content/uploads/FITS\\_Tanzania\\_FullReport\\_final.pdf](http://www.intermedia.org/wp-content/uploads/FITS_Tanzania_FullReport_final.pdf)>.

**Figure 4.2 Mobile Phone Penetration in Rural Areas**



Source: UniBul Merchant Services<sup>10</sup>

**Figure 4.3 Mobile Phone Penetration in Rural Tanzania**



Source: Photograph by Joseph Van Os<sup>11</sup>

One notable feature of m-commerce is that mobile phone consumers can easily be enticed to enter m-commerce even where they have no interests, or intention of doing so. This is because both phone services and m-commerce are carried out on the same device. Furthermore, the features surrounding m-commerce make it hard to separate m-commerce consumers from the mobile phone consumers. As a result, mobile phone

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<sup>10</sup> UniBul, 'M-Pesa by the Numbers' on *Unibul Credit Card Blog* (23 January 2013)

<<http://blog.unibulmerchantservices.com/m-pesa-by-the-numbers/>>.

<sup>11</sup> Ibid.

consumers are placed in a vulnerable position. They can easily become victims of m-commerce concerns even where they have not engaged in m-commerce.

Therefore, there is a need to address the concerns arising from m-commerce in the light of the integration between two modes of commerce, but keeping in mind the rights of the mobile phone consumers who are not engaging in m-commerce. However, this work will not address these concerns but rather briefly highlight them so as to understand the scope and need for m-commerce consumer protection.

It is also noted that general protection of mobile phone users in Tanzania is unsatisfactory and does not render full protection to mobile phone customers. The situation facing mobile phone users in Tanzania is fully summarised by the current deputy minister for communications, science and technology, Hon January Makamba, where he states: ‘You only need to possess a mobile phone to know that the quality of service, the rate of dropped calls, failure to initiate calls, unsolicited SMS, customer service issues and so forth has been a source of complaints by many subscribers.’<sup>12</sup> Consequently, protection measures available for mobile phone users are not sufficient to address the issues arising from m-commerce.

This is even more so given that m-commerce consumers are faced with further uncertainties and concerns as they become involved in a transaction integrated with e-commerce. Similarly, e-commerce concerns in Tanzania need to be addressed in light of m-commerce as the two evolve together. There is a need to highlight and address problems that consumers face in m-commerce so as to satisfactorily address both m-consumer and e-consumer protection in Tanzania. This chapter intends to highlight these problems.

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<sup>12</sup> See January Makamba, ‘Telecoms Sector Needs to do More’ on *Michuzi-Matukio* (24 June 2012) <<http://michuzi-matukio.blogspot.com.au/2012/06/january-makambatelecoms-sector-needs-to.html>>.

## 4.2 CONCERNING ISSUES

### 4.2.1 Security

Security is one of the major concerns that m-commerce consumers face in Tanzania. This is especially so because of the involvement of mobile banking which attracts fraudsters. Fraudsters can easily acquire mobile consumer funds through mobile fraud. There are no sufficient regulatory measures on mobile banking in Tanzania. The Bank of Tanzania (BOT), a central bank, is responsible for overseeing regulations of financial matters including mobile money transfer.<sup>13</sup> However, BOT has approved the mobile banking service for operation but has not fully regulated it under normal banking regulations.<sup>14</sup> Furthermore, it does not require the mobile network operator to officially partner with a bank.<sup>15</sup> This leaves the m-consumers not only vulnerable to fraudsters but also to the service providers due to a lack of regulations.

There are several aspects of security issues that Tanzanian m-consumers face. The major one being fraud. This will be extensively discussed below. Other aspects of security will also be pointed out in the discussion.

#### (a) Fraud

Fraud is one of the biggest problem facing m-commerce consumers in Tanzania. This is evident in the payment phase, as mobile phone payments are the main payment method for consumers. It offers little protection making it an easy target (see Figure 4.4).

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<sup>13</sup> This power is vested to the Bank of Tanzania through *The Banking and Financial Institutions Act, 2006* [5 of 2006, CAP 342 R.E. 2002].

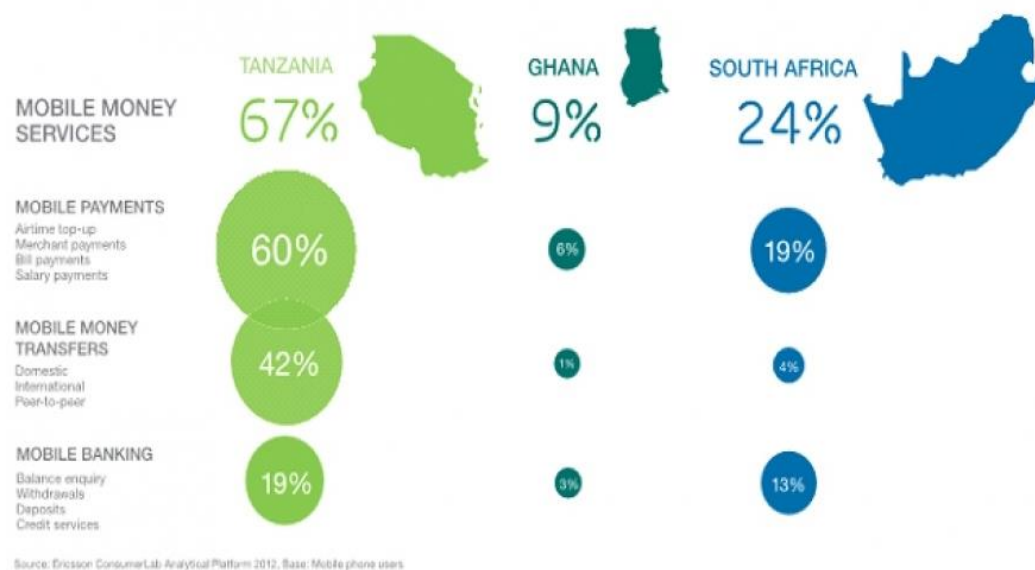
<sup>14</sup> International Finance Corporation (IFC), *M-Money Channel Distribution Case – Tanzania: Vodacom Tanzania M-PESA* (14 June 2010)

<<http://www1.ifc.org/wps/wcm/connect/3aa8588049586050a27ab719583b6d16/Tool%2B6.8.%2BCase%2BStudy%2B-%2BM-PESA%252C%2BTanzania.pdf?MOD=AJPERES>>.

<sup>15</sup> Ibid.



**Figure 4.4 The Use of Mobile Payments in Tanzania**



Source: Ericsson ConsumerLab <sup>16</sup>

There are many types of fraudulent tricks that mobile consumers face in mobile payments. These include receiving a lottery winning message informing users that they have won a certain sum of money; upon following instructions, the mobile phone user account is rewarded with the said sum before being wiped out of all its balance.<sup>17</sup> A similar trick is where mobile phone users receive a credit on their mobile phone accounts to be followed by a call from customer care informing them that the money has been deposited by mistake and advising them to refund back the credit. When the customers follow these instructions, they lose all the money in their account. There is also a practice of hacking where fraudsters hack mobile customer numbers and transfer all the money from the account, as well as calling family and friends of the owner of the account to ask for financial assistance pretending they are in distress.<sup>18</sup>

In addition, there are other fraudulent acts that take advantage of uninformed and

<sup>16</sup> Data from Ericsson ConsumerLab, 'M-Commerce in Sub Saharan Africa' (Ericsson Consumer Insight Summary Report, 30 August 2012) 8 <[http://www.ericsson.com/res/docs/2012/consumerlab/m-commerce\\_sub\\_saharan\\_africa.pdf](http://www.ericsson.com/res/docs/2012/consumerlab/m-commerce_sub_saharan_africa.pdf)>.

<sup>17</sup> 'Tahadhari ya Wizi wa kimtandao kupitia M-PESA [Warning against electronic theft through M-PESA]' on *Jamii Forums* (28 February 2013) <<http://www.jamiiforums.com/tech-gadgets-and-science-forum/347896-tahadhari-ya-wizi-wa-kimtandao-kupitia-m-pesa-2.html#post4976419>>.

<sup>18</sup> 'Aina Mpya Ya Wizi Wa Pesa Kwenye Mitandao Ya Simu [New Type Of Money Theft From Mobile Phones]' on *Martblog* (12 March 2012) <<http://martmalecela.blogspot.com.au/2012/03/aina-mpya-ya-wizi-wa-pesa-kwenye.html>>.



ignorant customers, using simple con tricks to fool customers before stealing from them. This may be done by payment agents or staff; personnel trusted by customers and to whom they reveal personal information. This places m-consumers in a vulnerable situation as the same people who are supposed to be safeguarding the consumer cannot be trusted. As there are insufficient regulatory measures and little information disclosure, m-consumers continue to be victimised.

The above examples are evidence of uninformed security risks, theft of personal information, hacking, lack of authentication from mobile phone service providers and the use of unsecure technologies, which facilitates fraud because of the poor security offered to mobile phone customers. By not providing adequate consumer protection, service providers and stakeholders are cultivating the service to be used by fraudsters. Consequently, the mobile phone payment system carries similar risks for consumers to when they send money through wired money transfer.

There have also been allegations against the mobile phone service providers where their personnel and staff have been accused of withdrawing money from their customers' accounts.<sup>19</sup> Whether these allegations are true or false has not been established as there is no court case or any precedent establishing that; however, the fact that mobile phone service providers are being accused by their customers is evidence that secure systems and customer protection is lacking.

Moreover, there have been complaints of credit balances being deducted from customers without justifiable reason. More often these deducted credits are not refunded back to customers.<sup>20</sup>

Similar concerns directed at the service providers are that they do not provide services that have been bought and paid for through mobile phone services.<sup>21</sup> Most customers don't follow up such issues as they find it hard to get any customer care

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<sup>19</sup> On file with author.

<sup>20</sup> 'Wizi Huu TIGO Pesa Haukubaliki Hata Kidogo [This Kind of Theft in TIGO Pesa is Unacceptable]' on *Jamii Forums* (28 February 2013) <<http://www.jamiiforums.com/business-and-economic-forum/263946-wizi-huu-tigo-pesa-haukubaliki-hata-kidogo.html#post3873280>>.

<sup>21</sup> 'Yale Yale Ya Tigo Na Ubabishaji/Wizi Wao [Same Issues From Tigo's Unreliability/Theft ]' on *Michiuzijr* (28 February 2013) <<http://michiuzijr.blogspot.com.au/2011/10/yale-yale-tigo-na-ubabaishaji-wizi-wao.html>>.

service, or they are not provided with satisfactory measures once they get hold of customer care personnel. Some customers even go so far as visiting the mobile phones offices, but efforts are in vain.<sup>22</sup>

There is a need to extensively address all fraud concerns that m-consumers face. Moreover, allegations of fraudulent activities from service providers or their personnel should not be tolerated. Charge backs or refunds should be given immediately to m-consumers whose credit or money has been unjustifiably taken from their account. The current situation of no consequences for such actions merely encourages the practise.

### **(b) Unsatisfactory Security**

In other instances, it is the lack of secure measures from mobile phone service providers that leaves mobile phone customers vulnerable and susceptible to fraud. An instance of this is where there are no satisfactory measures protecting mobile phone customers when they lose their handsets; hence their mobile bank accounts can be compromised immediately.<sup>23</sup> There are also no satisfactory measures to ensure that money dishonestly taken from the account is replaced or fraudulent actions are reversed.

It is evident that there is not enough security rendered to mobile phone customers, and little or no information is available to consumers on general security issues. Consumers learn through personal experiences after being defrauded. There are massive security risks, from technical fraud involving hacking and online theft to

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<sup>22</sup> See 'Zena Wa TTCL Customer Service Yake Hovyo - Soma Haya Majibu! [Poor Customer Service Experience From Zena of TTCL – Read These Responses!]' on *Jamii Forums* (15 March 2013) <<http://www.jamiiforums.com/business-and-economic-forum/300948-zena-wa-ttcl-customer-service-yake-hovyo-soma-haya-majibu-2.html> > ; 'Airtel: huduma Kwa Wateja Ni Mbovu/ Wanakesi Cma Na Watoa Huduma Wao [Airtel: Poor Customer Service/Workers Have Opened a Case With the company at Commission for Mediation and Arbitration -CMA]' on *Jamii Forums* (15 March 2013) <<http://www.jamiiforums.com/business-and-economic-forum/408147-airtel-huduma-kwa-wateja-ni-mbovu-wanakesi-cma-na-watoa-huduma-wao.html#post5825070>>; 'Vodacom Acheni Upumbavu [Vodacom stop this nuisance]' on *Jamii Forums* (15 March 2013) <<http://www.jamiiforums.com/habari-na-hoja-mchanganyiko/182499-vodacom-acheni-upumbavu-4.html>>.

<sup>23</sup> On file with author.

physical risks, such as the loss of a mobile device. There is no authentication of mobile phone provider services and hence they can easily be imitated by fraudsters.

Amongst necessary measures to be taken is the provision of remote access services that will allow consumers to freeze their accounts immediately after they have lost their mobile device or when their mobile banking information has been compromised.

Likewise the mobile phone operators in Tanzania should take further measures by teaming up and working together for the benefit of the consumer. For instance, all service providers can block mobile devices reported stolen on all their networks within 48 hours. The mobile devices with cellular connectivity services have a registered international mobile equipment identification number (IMEI), therefore it is easy for the mobile phone companies to block a device purported to be stolen.

There is a need for greater internal security measures as far as mobile banking is concerned. Mobile phone operators need to enact measures that will ensure close scrutiny of each transaction before they conclude payments or deductions from the mobile bank account.

#### **4.2.2 Unwarranted and high charges**

Among concerns that mobile phone customers face are unjustified and unfair charges. These occur in different phases of the mobile phone services, including talk time, during mobile payments and so on. A good example of this is double charging mobile phone customers when they make mobile payments, where in the same transaction, both the sender and receiver are charged for the money transfer.<sup>24</sup> Figure 4.5 shows M-Pesa, one of the mobile banking operators' charges and transaction fees. Where m-consumers are not only charged for sending and receiving transactions but also for changing their security pins. It is noted that these fees are usually quoted as US\$ hence the value in Tanzanian shillings fluctuates with the exchange rate at the

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<sup>24</sup> 'Tigo Acheni Wizi Wa Kipuuzi, Msitafute Pesa Kwa Kuwaibia Watanzania [Tigo Stop Obvious Theft, Stop Stealing Tanzanians' Money]' on *Jamii Forums* (28 February 2013) <<http://www.jamiiforums.com/habari-na-hoja-mchanganyiko/339414-tigo-acheni-wizi-wa-kipuuzi-msitafute-pesa-kwa-kuwaibia-watanzania-print.html>>.

time of the transaction, consequently, creating uncertainties for the consumer as to actual cost.

Whereas, these fees may seem relatively affordable to outsiders, this is not the case for the actual m-consumers where the majority of them live on the poverty line. It was estimated that 51% of the population living below \$1.25 a day poverty line in Tanzania possess personal ownership of mobile phone and 16% out of these use mobile banking service and mobile money (see Figure 4.6).

Moreover, some of the service providers offer extra credit recharge services with further charges and different calling plans that customers are not aware of and charges are unreasonably high.<sup>25</sup>

It is also alleged that some of the mobile phone service providers have constantly been changing their internet data bundles and have not been transparent about it. They have also been switching their customers between the bundles with no prior warning and customers become aware of extra charges after they have already incurred the expense.<sup>26</sup> This is the case in transactions where customers who are in a regular internet data bundle are switched to high cost data bundles after they have run with low data credit.<sup>27</sup>

Moreover, customers find themselves being charged for services they have not used. This may happen when a call is suddenly dropped before a proper connection but customers are charged the full fee. In some instances, a customer's phone credit simply disappears with no explanation or justified reasons.

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<sup>25</sup> Ibid.

<sup>26</sup> Mpekuzi, 'Wizi Unaofanywa na Makampuni ya Simu Tanzania [Theft by Mobile Companies in Tanzania]' on *Je Wajua Blog* <<http://jewajua.com/wizi-unaofanywa-na-makampuni-ya-simu-tanzania/1305#>>.

<sup>27</sup> Ibid.

**Figure 4.5 M-Pesa Tanzania Transaction Fees (USD)**

Value Transaction	Value (\$)		Charge (\$)
	From	To	
<b>Cash Deposit</b>	3.70	370.00	Free
<b>Send Money To Registered Customer</b>	0.74	370.00	0.15
<b>Send Money To Unregistered Customer</b>	0.74	7.40	0.74
	7.41	14.80	1.11
	14.81	37.00	1.85
	37.01	74.00	2.96
	74.01	148.00	4.44
	148.01	222.06	5.92
	222.07	370.00	8.14
<b>Withdraw Money - Registered Customer</b>	3.70	7.40	0.26
	7.41	14.80	0.37
	14.81	37.00	0.74
	37.01	74.00	1.11
	74.01	148.00	1.85
	148.01	222.06	2.96
	222.07	370.00	5.18
<b>Withdraw Money - Unregistered Customer</b>	0.74	370.00	Free
<b>Additional Transactions</b>			
<b>Balance Enquiry</b>		0.04	
<b>Change PIN</b>		0.04	

*SOURCE: Company Information, 2010*

Source: Vodacom Tanzania<sup>28</sup>

<sup>28</sup> IFC, above n 14.

**Figure 4.6 Mobile Phone and Mobile Money Usage Statistics Among the Tanzanian Population**

	Usage of Mobile Money Among All Respondents (%)	Personal Ownership of Mobile Phone Among All Respondents (%)
<b>Total Population</b>	24	63
<b>Gender</b>		
<b>Male</b>	28	72
<b>Female</b>	21	55
<b>Residence</b>		
<b>Urban</b>	41	75
<b>Rural</b>	17	58
<b>Age Group</b>		
<b>15-24</b>	20	51
<b>25-34</b>	27	69
<b>35-44</b>	27	74
<b>45-54</b>	26	67
<b>55-64</b>	27	64
<b>65+</b>	9	39
<b>Poverty level</b>		
<b>Above \$1.25/day PPP</b>	35	78
<b>Below \$1.25/day PPP</b>	16	51

Source: InterMedia national tracking survey of Tanzania; n=2,000; September-October 2011.

Source: Intermedia<sup>29</sup>

### **4.2.3 Poor services**

#### **(a) Poor Customer Service**

The customer care service offered to Tanzania mobile phone consumers<sup>30</sup> has been very poor and undergone little improvement over the years.<sup>31</sup> It is almost impossible to get through a call to customer care. Mobile phone customers are faced with long

<sup>29</sup> Intermedia, above n 9.

<sup>30</sup> Please refer to the discussion on customer care services offered to Tanzania mobile phone customers on Chapter 3.4.1(b)(iv).

<sup>31</sup> Makamba, above n 12.

waiting times if they are lucky to get through to a customer care line.<sup>32</sup> This has led to customers to decide to physically walk in when they need assistance from their service providers; however, this does not guarantee help or assistance.

It is evident that customer service for m-consumers in Tanzania is unsatisfactory. This raises another important issue of dispute settlement. As m-consumers in Tanzania are required to settle matters with their service providers before they can seek further assistance, they are left with little or no assistance in case of a grievance. It is clear that a simple and working mechanism is needed to enable m-consumers to resolve matters in a quick and satisfactory way. This mechanism needs balance representation among the operators and m-consumers, needs to be unbiased, transparent and treat m-consumer interests as a priority. There should also be clear best practise rules on services m-consumers receive every day. This will not only bring transparency among the m-consumers but will also keep m-consumers informed on matters relating to the service they receive.

Moreover, there is a need to make the mobile phone operators, who fail to even attempt to provide customer care or resolve disputed matters, accountable for their actions. For instance, fines and penalties to mobile phone operators who unfairly deduct their customer's credit or money from their accounts will likely discourage this practise.<sup>33</sup>

There is a need to establish a customer care special emergency response unit in every mobile phone company; this will allow for quick responses to consumers whose mobile phones have been stolen or whose mobile bank details have been compromised. All response units should have the same number regardless of mobile operators and should aim to prevent money from being stolen or support its recovery. These are important measures as general customer care services may not be able to act fast enough to stop or prevent crimes. As the situation currently stands in Tanzania, customer care is non-existent.

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<sup>32</sup> Hellström, above n 8, 4.

<sup>33</sup> The mobile companies will be forced to be accountable for such actions and hence deter similar future practices.

## **(b) Poor Network Service**

The network service offered to customers has been very poor and disappointing. Mobile phone customers in Tanzania are faced with several problems including poor voice quality, undelivered messages, dropped calls and long and unexplained network failures.<sup>34</sup>

As mentioned, customers face similar problems when they make mobile payments.<sup>35</sup> They receive little assistance from providers in case of input errors, sending payment to a wrong or non-existing number, refunds or cancellations.

### **4.2.4 Spam**

Spam is a problem faced by both m-consumers and e-consumers alike.<sup>36</sup> However, spamming in mobile phones has more serious consequences as it often involves money and loss of credit by the m-consumer. This is due to the direct charges that m-consumers face through mobile phone services. M-consumers are subject to charges for receiving the spam message, reading the spam message, replying to the spam message and most likely inadvertently subscribing and receiving more spams without their knowledge.

M-consumers become even more vulnerable when they are spammed by their own service providers. M-consumers are subject to several promotional messages and various spams with no ability to opt out.

There is a growing trend to fundraise via mobile phone where m-consumers are sent messages requiring them to reply to show their support, an action which deducts credits from their accounts, most of the time, without their knowledge.

One way to ensure that m-consumers do not subscribe to services they do not want is

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<sup>34</sup> Ibid.

<sup>35</sup> Please refer to the discussion on customer care services offered to Tanzania mobile phone customers in Chapter 3.4.1(b)(iv).

<sup>36</sup> For further discussion on spam, see Chapter Three.



to ensure there is a confirmation process in every subscription, which clearly communicates to m-consumers what they are subscribing to, for how long and at what cost. Furthermore, m-consumers should be required to confirm the subscription by sending a message or pressing appropriate buttons.

#### **4.2.5 Information disclosure**

M-consumers in Tanzania have little information on the service they receive from their providers, a lack of education and knowledge on how to use the services, and an insufficient understanding of mobile money applications.<sup>37</sup>

Furthermore, m-consumers receive insufficient information regarding transactions they enter into using their mobile devices. This is so as little information is provided to them and what information they do receive is difficult to access given the nature of the gadgets m-consumers are using; small screens, limited storage capacity and other technical limitations. It is highly likely for m-consumers to miss the message or information sent simply by not seeing the whole content or because the content was partially delivered.

It is important to ensure that m-consumers are fully informed regarding the transactions they are involved in, and throughout all stages of m-commerce transactions. In cases where transactions have been carried out solely through mobile devices, there is a need for a clear and accurate description of the products or service offered, actual costs including extra costs, payment procedures, shipping and delivery details, and the sellers contact details and how they can be reached. This information needs to be concise and presented in a visible manner.

It is important that m-consumers are provided with a phone number where they can call immediately for further clarifications or in case of doubt. It is also important to

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<sup>37</sup> Intermedia, *Mobile Money in Tanzania: Use, Barriers and Opportunities* (The Financial Inclusion Tracker Surveys Project) February 2013, 3 <[http://www.intermedia.org/wp-content/uploads/FITS\\_Tanzania\\_FullReport\\_final.pdf](http://www.intermedia.org/wp-content/uploads/FITS_Tanzania_FullReport_final.pdf)>.

offer more detailed information so the buyer may be able to review and retrieve it later if necessary. M-consumers should be granted a cooling off period before the transaction is finalised so they can rectify errors and make changes where required.

It is also necessary to ensure that m-consumers are provided with a transaction history so they are able to review their activities. This is not the current practice in Tanzania; receiving transaction records and history is very difficult.

It is also vital that sufficient care is taken to ensure m-consumers are aware of several transaction procedures. For instance, this may involve sending the m-consumer immediate alerts (from service providers) affirming they have concluded a mobile transaction or to the contrary. How this can be carried out depends on the nature of the transaction, whether it is solely a mobile transaction or whether a transaction is integrated with e-commerce. Irrespective, confirmation or otherwise of payments is crucial to m-consumers and it is the responsibility of the mobile phone operators to inform customers regarding their mobile phone transactions. It is imperative that customers are informed when their mobile bank accounts are deducted.

## CHAPTER FIVE

### 5. AVAILABLE LEGAL INITIATIVES ADDRESSING ONLINE CONSUMER TRANSACTIONS IN TANZANIA

#### 5.1 INITIATIVES ADDRESSING ONLINE CONSUMER TRANSACTIONS

##### ***5.1.1 Laws protecting electronic consumers in Tanzania***

As noted in the previous chapters, there are currently no specific laws enacted in Tanzania to govern electronic commerce (e-commerce) and protect online consumers (e-consumers). There are available laws that address consumer protection matters. However, these laws are unlikely to yield the same results when applied in electronic transactions. This is due to the fact that most of these laws and regulations were designed to facilitate paper based transactions.<sup>1</sup> The following discussion will point out the available laws in Tanzania and other legal measures; pointing out the extent which they can be applied in e-consumer transactions. Laws that do not directly address consumer issues will also be discussed to show what is available under Tanzanian jurisdiction. This is done out of a realisation that some of these laws may need to be highlighted and addressed for effective e-consumer protection measures to take place; and therefore may be important in light of the available laws. This discussion will reflect the problems pointed out in previous chapters. The available provisions of the laws and the extent to which they address these problems will be highlighted.

It is essential to note here how Tanzania regards foreign laws and decisions. According to article 63 of the *Constitution of the United Republic of Tanzania, 1977*

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<sup>1</sup> Adam J Mambi, *ICT Law Book: A Source Book for Information & Communication Technologies and Cyber Law* (Mkuki na Nyota, 2010) 13 -15; Law Reform Commission of Tanzania, *Position Paper on E-Commerce* (2003) <<http://www.lrct.go.tz/position-papers/>>.

(as last amended by Act No. 1 of 2005), international treaties or codes of conduct are not applicable in Tanzania unless they are ratified. Moreover, according to section 2.3 of *The Judicature and Application of Laws Act* [CAP 358 R.E. 2002], English laws including Common Law, Doctrine of Equity, Statutes of General Application of England, applicable before the 22 of July 1920 are applicable in Tanzania; as far as the circumstances permit, and subject to such qualifications as local circumstances may render necessary. Other foreign laws and initiatives hold a persuasive value in the Tanzania legal system. They may be used in court to interpret, shade a light to certain matters or widen the legal principles.<sup>2</sup>

## 5.2 PROVISIONS REGULATING PROBLEMS ARISING IN THE FORMATION OF ONLINE CONSUMER TRANSACTIONS

### 5.2.1 *Business to consumer online transactions*

#### (a) *Tanzania Communications Regulatory Authority Act, 2003* [12 of 2003]

This Act establishes the Tanzania Communications Regulatory Authority (TCRA) for the purpose of regulation and overseeing telecommunications matters. The TCRA also regulates broadcasting, postal services and other telecommunication services such as providing for allocation and management of the radio spectrum, covering electronic technologies and other information and communication technologies (ICT) applications. The Act also regulates consumer affairs in telecommunication matters.

This Act does not provide for any offences. Issues of fraud, misleading actions, unreasonable and high charges, mistakes and errors, spam, unfair terms and conditions, language and insufficient information are not addressed. However, some of the provisions are discussed below so as to highlight the procedures that the

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<sup>2</sup> See *Mayers v Akira Ranch Ltd* (1972) EA 347; *Juwata v Kiuta* (Unreported, Civil Appeal No 29, 1987).

consumer has to follow when seeking remedies.

It should be noted here that the Act was enacted before online commerce became popular in Tanzania. Consequently the Act's focus is telecommunication services as the products and services offered to consumers. For instance, whereas the Act regulates internet products and services offered to consumers, the focus is internet itself as a product, hence internet coverage and distribution rather than consumer products and services offered through the internet. As a result, protection of e-consumers is not fully covered.

The Act empowers the TCRA to deal with the matters arising from the Act. The Authority's duties are to issue, renew and cancel licences; to establish standards for regulated goods and regulated services and standards for the terms and conditions of supply of the regulated goods and services; to regulate rates and charges; to monitor the performance of the regulated sectors; and to facilitate the resolution of complaints and disputes.<sup>3</sup> Furthermore, the authority has powers necessary to perform its functions, among them the power obtain documents and evidence, conduct inquiries and investigate into complaints or other issues.<sup>4</sup> As mentioned, telecommunication is seen as a commodity in itself to the extent that the Authority's duties are limited in regulating charges, issuing and cancelling communication licences and regulating supply of the telecommunication goods such as telephone airtime and internet bandwidths. Neither the Act nor the Authority addresses matters of online commerce and e-consumer transactions.

The Act also establishes the Consumer Consultative Council ('the Council') which consists of no more than ten members with a quorum of four. The members are appointed by the Minister of Communications and Technology from amongst a list of names provided by members of the business community or by an organisation or organisations legally recognised as being representative of private sector interests.<sup>5</sup> The Act requires that in nominating and appointing persons for the Council, the members of the private sector and the Minister shall ensure the Council as a group has

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<sup>3</sup> *The Tanzania Communications Regulatory Authority Act, 2003* [12 of 2003] s 6.

<sup>4</sup> *Ibid* s 15 -7.

<sup>5</sup> *Ibid* s 37(2).

knowledge and understanding of the interests of consumers and that of the regulated services, including the interests of low income, rural and disadvantaged people, industrial and business users and government and community organisations.<sup>6</sup>

Through these provisions one can clearly argue that consumers are not effectively represented under the Act. This is because members of the Consumer Consultative Council, a Council which deals with consumer complaints under the Act, are members of business communities or representatives of private sector interests. Even though the Act requires these members to have knowledge and understanding of the interests of consumers, this does not guarantee full representation of consumer interests. Business people are often the opposing party in consumer protection cases and cannot at the same time be the sole adjudicators. There is a need for consumer representation in any decision-making body which deals with consumer issues so as to represent and safeguard their interests. There is also a need for balance where businesses, consumers and non-aligned parties should be involved.

According to the Act, the Council has the power to make rules regulating its own procedures and any other matters related to its functions. It also has a function of representing the interest of consumers by making submissions, providing opinions and information and consulting with the TCRA, receiving and disseminating information and views on matters of interest to consumers of regulated goods and services, establishing local, regional and sector consumer committees and consulting with them. It can also consult with industry, government and other consumer groups on matters of interest to consumers of regulated goods and services.<sup>7</sup> A point to be noted here is that whilst the Council has the power to carry out these functions, it is not mandatory to exercise them, and neither do they have specific deadlines to implement recommended measures. Consequently, there are no established local, regional or sector consumer committees to date in Tanzania.

The Act also provides for complaints and dispute resolutions.<sup>8</sup> According to the Act, complaints against a supplier of regulated goods or services in relation to any matter

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<sup>6</sup> Ibid s 37(5).

<sup>7</sup> Ibid s 38.

<sup>8</sup> Ibid Part VIII.

connected with the supply, possible supply or purported supply of the goods or services can be made to the TCRA, and they will act only on a complaint where the complainant has an interest in the matter to which the complaint relates, and if the complaint is not frivolous or vexatious.<sup>9</sup>

The Act further requires that complaints submitted to the TCRA have been considered adequately by the supplier. If this is not the case, then the TCRA may refer the complaint to the supplier with a request that the supplier should consider or reconsider the complaint.<sup>10</sup> This may be discouraging to the consumers, especially where suppliers or businesses are not ready to cooperate or work on the problem. It may also cause delays and create lack of confidence of due process through the authority. This is especially so under the current situation in Tanzania as far as customer care of telecommunication system is concerned. Consumers get poor and unresponsive customer care from service providers even for general problems which do not require special attention.<sup>11</sup>

Furthermore, the Authority may make representations to the supplier on behalf of the complainant or to the complainant on behalf of the supplier as the Authority sees fit. This does not guarantee that the consumers/complainant case will always be presented.<sup>12</sup> It will bring more sense of certainty and fairness to consumers if they know that they will always be represented as long as they have sound claims. The current provision does not guarantee a consumer representation in the Council and further brings a prejudicial sense especially where members of the Council are business people.

The Act further provides that in instances where a complaint is not resolved to the satisfaction of a complainant within sixty days after the Authority first became obliged to investigate it, the complainant may request the Authority to refer the complaint to a Committee of the Authority for a decision.<sup>13</sup>

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<sup>9</sup> Ibid s 40.

<sup>10</sup> Ibid s 40(3).

<sup>11</sup> For further discussion on customer care of telecommunication services refer to Chapter Four.

<sup>12</sup> *The Tanzania Communications Regulatory Authority Act, 2003* [12 of 2003] s 40(4).

<sup>13</sup> Ibid s 40(7)(8).

For the purposes of dealing with consumer complaints, the Act requires the Authority to establish a dedicated unit which will receive and follow up on complaints from consumers. These units are vested with a task of investigating all complaints and attempting to resolve the complaints amicably, and in the event they cannot be resolved within thirty to sixty days, the Committee concerned shall present its findings and recommendations to the Authority for action.

The Act further provides that where the parties are not satisfied with an award given they can appeal to the Fair Competition Tribunal. However, this appeal will be admitted only if the grounds for appeal are: the award was not reasonably open to the Authority based on the evidence; there was an error in law; the procedures or other statutory requirements applicable to the Authority were not complied with and the non-compliance materially affected the award; or the Authority did not have power to make the award. This provision creates limitations in appealing to the Fair Competition Tribunal. This should not be the case especially in matters concerning consumer protection. Furthermore, there are no avenues for a decision review or other medium for appeals when consumers are dissatisfied with the Authority's decision and hence there is a need for another body that consumers can appeal to. Whereas this act seeks to address consumer problems, the Act is limited to the extent that little protection is rendered to the consumers.

There is a limit of rights due to the wording of the provisions as discussed above. There are also accessibility limits because the Authority and Councils are not present in all the regions in Tanzania. It is noted that the Authority tried to establish six urban offices; however, this did not sufficiently address the issue of accessibility. Consumers still have to travel to these offices in order to access the services needed. The costs of travel and the whole procedure may easily deter consumers from pursuing matters further.

Apart from the shortcomings of the Act, the general consumer situation in the country is unsatisfactory. In order for consumers to be afforded effective protection, they need knowledge, skills, information, and accessible dispute mechanisms among other



things.<sup>14</sup> In Tanzania, consumers are vulnerable,<sup>15</sup> they are not well informed, the ‘active consumer education is absent,’<sup>16</sup> and the dispute settlement framework available to consumers involves serious challenges.<sup>17</sup> This can be elaborated through the TCRA dispute settlements challenges pointed in the paragraphs above. Moreover, it is argued that the TCRA holds extensive powers as it acts as a quasi-legislator through its powers to enact rules, and as a quasi-judicial body through its dispute settlement powers and its executive powers of issuing licenses and enforcement of compliance.<sup>18</sup> As a result, this leads to a conflict of interest<sup>19</sup> and also confusion for consumers. It is argued that ‘[c]onsumer power cannot be fully unleashed and felt in the market without an organized consumer base.’<sup>20</sup> This confirms that in order to have effective consumer protection, consumers themselves need to be fully represented. However, ‘this organized base is woefully lacking in Tanzania.’<sup>21</sup>

Despite its shortcomings in consumer protection, TCRA has played a major contributing role in achievement when it comes to regulating communication services in the country. As the sole foreseer of the communication industry, TCRA has brought several developments in the area including increasing the number of telecommunications companies and services in the country, from one company ‘before TCRA establishment in 2003 to over seven phone companies with about twenty eight million (28,000,000) SIM Cards in the market’<sup>22</sup> by 2013. This growth has improved the lives of people providing them with services such as mobile money transfer, bill payment, and accessible communications. Similar improvements can be seen in the radio industry which has grown from one radio station at the time the country gained its independence to 85 stations, 26 TV stations, and internet services

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14 Ringo W Tenga, ‘Consumer Protection Model and the Tanzania Compliance Framework’ (Paper presented at the Tanzania Communications Regulatory Authority (TCRA) Competition Workshop, Dar es Salaam, 26 June 2009) 8 -14.

<sup>15</sup> Ibid 8.

<sup>16</sup> Ibid 13.

<sup>17</sup> Ibid 19.

<sup>18</sup> Ibid.

<sup>19</sup> Ibid.

<sup>20</sup> Ibid 8.

<sup>21</sup> Ibid.

<sup>22</sup> Tanzania Communications Regulatory Authority (TCRA), *The 10th Anniversary of TCRA: A Decade of Communications Revolution in Tanzania – TCRA* (25 November 2012) <<https://www.tcra.go.tz/index.php/archive-panel/headlines-archive/225-the-10th-anniversary-of-tcra-a-decade-of-communications-revolution-in-tanzania>>.

which had about eight million users by 2013.<sup>23</sup> Efforts are also evident from the successful installation and implementation of the Telecommunication Traffic Monitoring System (TTMS) which enhances the monitoring of illegal activities among other things, content regulation, tariff regulations, the introduction of card registration which ensures accountability, identity and curbs abuses of mobile phone services, content monitoring, and regulation and competition monitoring among others.<sup>24</sup>

There is no doubt that TCRA has made commendable efforts in carrying out its duties to Tanzanian citizens; it is also clear that the responsibility vested upon it to oversee competition and consumer protection in communication matters is massive.<sup>25</sup> Clearly, e-commerce and e-consumer protection in Tanzania not only needs to be specifically addressed, but it also needs an independent body to oversee its application. There is no doubt that in order to have an effective consumer protection, an accessible, free, impartial, less bureaucratic system is needed.

**(b) *The Tanzania Communications (Consumer Protection) Regulations, 2005***

These regulations were enacted in 2005 under the provisions of the *Tanzania Communications Regulatory Authority Act*. The regulations set out consumer protection provisions which need to be followed by service providers and other stakeholders while dealing with consumers of telecommunication. It should also be noted here that the lawmakers have addressed telecommunication as a product or service by itself and the regulations are limited to that perspective. Consequently, consumers who use telecommunication as a medium for transactions are rendered with little protection. This is evident from the meaning of a consumer given in the regulation where they are defined and limited to a ‘customer of electronic communication and postal services’.<sup>26</sup>

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<sup>23</sup> Ibid.

<sup>24</sup> Ibid; Tanzania Communications Regulatory Authority (TCRA), *TCRA 2011 Annual Report and Accounts for the Year Ended 30th June 2011* (2011) < <https://www.tcra.go.tz/index.php/publication-and-statistics/reports>>.

<sup>25</sup> See discussion on separation of competition and consumer protection in Chapter Six.

<sup>26</sup> The Tanzania Communications (Consumer Protection) Regulations, 2005, r 3.

Furthermore, the relationship between businesses and consumers has been defined and limited by the regulations to be a contract for service; the ‘licensee shall enter into a contract for service with a consumer.’<sup>27</sup> This limiting definition of consumers is further narrowed down throughout the provisions of the regulations as discussed further on.

These regulations do not address problems of fraud, misleading or deceptive conduct, language, unreasonable and high charges, mistakes and errors, spam, unfair terms and conditions. However, they have addressed the issue of insufficient information and information on terms and conditions. The regulations require a licensee to provide a clear and understandable description of available services and the terms, conditions, rates, and charges for those services.<sup>28</sup> The regulations further require a basic postal and electronic communications operator to regularly publish or arrange to be published, directories and guides for the services they offer.<sup>29</sup> These are general requirements for providing information to consumers. The provisions are so general that they leave the service providers with the final decision as to what to include and what not to include in the information they offer to their customers. Specific issues concerning unfair terms and conditions are not addressed.

The regulations further address different matters concerning postal and telecommunication customers. The provisions require each licensee to establish a customer care system within which customers may make inquiries and complaints. This requirement has to be carried out within six months from the date of being licensed by electronic communication operators and within three months by postal operators.

Furthermore, the regulations require all postal and electronic communication operators to notify customers about the availability of consumer complaint procedures and have in place forms to be used for registering complaints. The provisions also require each licensee to provide a response to the customer’s complaint within 21 business days of receipt of the inquiry or complaint from the customer. Whereas this

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<sup>27</sup> Ibid r 9.

<sup>28</sup> Ibid r 8(1).

<sup>29</sup> Ibid r 4(1).

is a useful provision which safeguards consumer interests, it poses two problems regarding the efficiency of the provision itself, and its application. The provision is insufficient in that it does not offer a prompt response to consumers, the provision allows for a six month period for resolving issues for electronic communication operators; this is a long period, especially where a matter is trivial. Similarly there is a three month requirement for postal operators.

Moreover, the provision is ineffective in its implementation. The general state of customer care in the communication sector is not satisfactory.<sup>30</sup> Not only that, consumers are unaware of the complaints procedures, and they can hardly contact their service providers for any matter. Even those who decide to visit the operators' offices are unsuccessful. One customer complained of going to his service provider headquarters' office four times and waiting for hours without being assisted.<sup>31</sup> Furthermore, most of the operators' headquarters are situated in urban areas, and therefore regional and rural customers may not get easy access and representation. It also seems the only way to resolve issues with one's providers is to visit headquarter offices as customer care services can hardly be offered over the phone. Currently, there are no effective mechanisms to ensure that the operators are abiding to these guidelines. This is complicated further by the current system that requires a complainant to submit only complaints which they have interest with.<sup>32</sup> This limits complaints only to those of a personal nature and discourages mass interest complaints.

The regulations further provide that where a customer is dissatisfied with the licensee's response, they may refer the complaint to the Authority. This provision appears to give consumers easy access and a further avenue in cases of grievance with their operators. However, this is not the case as provisions of the *Tanzania Communications Regulatory Authority Act* require that all complaints submitted to the

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<sup>30</sup> This is evidenced by the statement of Deputy Minister for Communications, Science and Technology in Tanzania, Hon January Makamba given on 24 June 2012, 'Telecoms Sector Needs to do More' on Michuzi-Matukio (24 June 2012) <<http://michuzi-matukio.blogspot.com.au/2012/06/january-makambatelecoms-sector-needs-to.html>>; see also Chapter Four, 4.2.3(a); Johan Hellström, *The Use and Possibilities of M-Applications in East Africa* (2009) 4 <[http://www.w3.org/2008/10/MW4D\\_WS/papers/hellstrom\\_mapps.pdf](http://www.w3.org/2008/10/MW4D_WS/papers/hellstrom_mapps.pdf)>.

<sup>31</sup> On file with author.

<sup>32</sup> *Tanzania Communications Regulatory Authority Act*, 2003 [12 of 2003] s 40.

Authority must first be adequately considered by the supplier. If this is not the case then the Authority may refer the complaint to the supplier with a request that the supplier consider or re-consider the complaint.<sup>33</sup>

The regulations also provide that where a person is aggrieved by the decision of the Authority, they may appeal to the Fair Competition Tribunal established by the *Fair Competition Act, 2003* (Cap 285 R.E. 2002). It is noted that there have been few customer appeal cases through the Fair Competition Tribunal from 2007 to date.<sup>34</sup> This may be taken as an indication that the service is inaccessible to consumers.

**(c) *Electronic and Postal Communications Act, 2010* [3 of 2010]**

It is evident from the above discussed laws that a lot of consumer concerns have not been addressed. There are gaps, not only in protection of e-consumers but also for the targeted consumers addressed in the Acts. This gap was felt in the communication industry; which is the fastest growing industry in Tanzania. With major developments in services and products and little legal direction, the impact of having no regulations in such a big industry was felt. Consequently, in 2010, the government had to address the rising concerns through the *Electronic and Postal Communication Act*. This Act has to be considered in conjunction with the *Tanzania Communications Regulatory Authority Act* which is considered a principal Act.

Similar to the *Tanzania Communications Regulatory Authority Act*, the *Electronic and Postal Communication Act* does not address online consumer protection or online commerce. It was enacted so as to regulate the telecommunication and postal industry with a view to keeping abreast of developments in the electronic communications industry; and to also provide for a comprehensive regulatory regime for electronic communications service providers and postal communications service providers. The

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<sup>33</sup> Ibid s 40(3).

<sup>34</sup> The United Republic of Tanzania Fair Competition Tribunal – FCT, *Application Cases* (7 October 2014) Fair Competition Tribunal <[http://www.fct.or.tz/index.php/applications/category/upcoming\\_cases/](http://www.fct.or.tz/index.php/applications/category/upcoming_cases/)>; Section 13 of the Fair Competition Tribunal Rules, 2006 require that, after a lodging of a memorandum of appeal, the registrar of the tribunal to publish a notice of appeal on the tribunal's website, and in any widely circulated newspaper or by other appropriate means.

Act addresses some of the issues which were not addressed in the principal Act. Telecommunication is still viewed as a product or service under this Act, and the aspect of it as medium is not considered. The Act defines ‘consumer’ to mean any person who uses electronic communication or a postal product or service; a ‘customer’ to mean any person who obtains or seeks to obtain services of any kind from a person undertaking activities pursuant to the Act, and includes subscribers and ‘electronic communication’ to mean radio communication or, as appropriate, the communication of information in the form of speech or other sound, data, text or images, by means of guided and unguided electromagnetic energy.<sup>35</sup> The definitions exclude consumers who buy online and also consumers who buy through mobile commerce. Consequently, issues raised in this work are not covered.

The Act addresses issues such as issuing licences and regulating electronic communication systems<sup>36</sup> such as network facilities licences, network services licences and postal and courier services licences.<sup>37</sup> Consequently, any person who wishes to operate electronic communications system or offer postal communications, electronic communications or content services has to apply for a licence.

The Act has also introduced emergency number services where a licensee of network services is required to offer free of charge calls to emergency services such as customer assistance, fire and ambulance; a requirement which was not stated in the principal Act.<sup>38</sup>

The Act also addresses issues of postal communications such as postal service licensing, postal licensee liabilities, confidentiality of correspondences, delivery and other postal regulations such as stamps and prohibited items.<sup>39</sup> The Act also addresses the issue of competitive practices and conducts where it prohibits a dominant licensee to engage in acts which may affect other licensees in the market.<sup>40</sup> Issues such as collusive agreements, tying or linking arrangements and spectrum management are addressed.

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<sup>35</sup> *Electronic and Postal Communications Act, 2010* [3 of 2010] s 3.

<sup>36</sup> *Ibid* Part II.

<sup>37</sup> *Ibid* s 5.

<sup>38</sup> *Ibid* s 18.

<sup>39</sup> *Ibid* Part III.

<sup>40</sup> *Ibid* Part IV.

The Act has also addressed issues of mobile phone numbers and sim card registrations.<sup>41</sup> This issue, like other issues mentioned in the Act, was not addressed before. Users were able to buy sim cards and dispose of them without any trace, and mobile phone numbers could easily change hands. The Act also addresses content regulations<sup>42</sup> for content service providers and provides for several offences<sup>43</sup> which did not exist before.

In general, the *Electronic and Postal Communication Act* has addressed some of the issues that have not previously been addressed and also introduced new offences. This is a commendable effort which offers some protection to general consumers and regulates competition. However, examination of the Act's provisions will reveal that despite the initiatives, many consumer concerns have not been addressed. The question as to what extent the Act protects telecommunication consumers will not be addressed here; rather the discussion will focus on online consumers and examine whether the Act does address the interests of online consumers or electronic commerce consumers at large.

The Act does not address issues of fraud, mistake and errors, spam, unfair terms and conditions and misleading actions. One of the provisions in the Act<sup>44</sup> prohibits any person from furnishing information which is false or misleading in relation to sim cards. This provision is centred on sim card offences, where the law prohibits the selling of sim cards without authorisation of the appropriate network service licensee, use of stolen sim cards, failure to report lost or stolen sim cards, tampering with sim cards, use of unregistered sim cards or providing false information regarding sim cards.<sup>45</sup> The provision does not address the general problem of misleading and deceptive conduct.

The Act<sup>46</sup> addresses the issue of pricing in general where it provides that electronic communications licensees may set and revise such prices as they deem appropriate, for the application and content services which they provide to the public. The Act

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<sup>41</sup> Ibid s 85 – 96.

<sup>42</sup> Ibid ss 103 - 14.

<sup>43</sup> Ibid Part VI.

<sup>44</sup> Ibid s 134.

<sup>45</sup> Ibid Part VI (b).

<sup>46</sup> Ibid s 31.

further requires that the licensees have regard to transparency, the competitive opportunities of other licensees and takes into account the regulations and recommendations of the international organisations of which the country is a member.

The provision has potential as it has given guidance on product and service pricing. However, the law is too general and gives service providers the power to set the prices as they deem appropriate. The provisions argue service providers must take into account the international guidelines; however, the wording of the provisions is clear that this is not a mandatory requirement but rather a guiding provision.

Furthermore, the provision addresses prices offered by electronic communication licensees in specific, and hence is limited only to the product and services they offer to specific consumers, that is airtime prices and bandwidth prices. Online consumers are excluded. Apart from the above provision the Act does not address any other issues concerning unreasonable and high charges that consumers face.

It can be argued that this requirement is more for checking competition practices between the licensees as the law further requires that licensee prices should not contain discounts that unreasonably prejudice the competitive opportunities of other licensees providing applications services and content services to the public; and prices offered by licensees holding a dominant position in the market should be submit to the Authority for its prior approval.<sup>47</sup>

Reference to terms and conditions is provided under section 17 where the provision requires an individual licensee to include terms and conditions set by the Authority including; quality of service, licensed area, interconnection, consumer protection, universal service obligation, shareholding structure and roll out plan. Reading through this provision one will realise that the provision only sets out the obligations of individual licensees. This is established further by the proceeding provision which is subtitled ‘additional obligations for network licensee holding and individual licence.’<sup>48</sup> This excludes other licensees and consequently leaves a gap as far as consumer protection is concerned.

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<sup>47</sup> Ibid s 63.

<sup>48</sup> Ibid s 18.



The Act addresses the issue of the language problem to the extent that it allows the Minister responsible to make regulations on the use and promotion of the use of official languages in content provided by content service licensees.<sup>49</sup> First of all, the provision singles out content service licensees, which evidently creates a gap which needs to be addressed, and also the provision does not comprehensively address language concerns among telecommunication consumers or online consumers, such as those raised in this thesis.<sup>50</sup>

The *Electronic and Postal Communication Act* deserves applause for addressing many technical and procedural issues regarding telecommunications in the country; an effort which was lacking before. However, the Act still does not provide sufficient protection for telecommunication consumers nor does it address concerns of online consumers and electronic commerce consumers in general.

**(d) *Fair Competition Act, 2003 (Cap 285 R.E. 2002)***

The *Fair Competition Act* was enacted to enhance the welfare of the people of Tanzania as a whole by promoting and protecting effective competition in markets and preventing unfair and misleading market conduct throughout Tanzania.<sup>51</sup> The Act aims to promote and regulate competition and consumer protection.

This aim can further be analysed through the provisions<sup>52</sup> of the *Fair Competition Act*. These define ‘competition’ to mean:

a process whereby two or more persons supply or attempt to supply or substitutable goods or services to the persons in the same relevant geographical market; or to acquire or attempt to acquire the same or substitutable goods or services from the persons in the same relevant geographical market.<sup>53</sup>

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<sup>49</sup> Ibid s 108.

<sup>50</sup> See Chapter Three and Chapter Six of the thesis.

<sup>51</sup> *Fair Competition Act, 2003 (Cap 285 R.E. 2002)* s 3.

<sup>52</sup> Ibid s 5.

<sup>53</sup> Ibid.

The responsibilities given through the *Fair Competition Act* of overseeing the interests of both competition and consumers may be described here as a drawback to sufficient consumer protection in the country.<sup>54</sup> The demand for both is massive, and there is a danger of leaning more on one side than the other when such responsibilities are vested in one body. It can be argued that in this case, regulating and promoting competition receives more emphasis than consumer protection.

This is revealed through practice, where significant efforts have been directed to regulate competition while consumer protection remains unsatisfactory. It is only recently that consumer councils and departments have been enacted.<sup>55</sup> Also, the Act does not specifically address or show any recognition of e-consumers nor does it address cross border transactions.<sup>56</sup> This results in less protection of e-consumers through the Act.

(i) Fraud

The problem of fraud is addressed in the *Fair Competition Act* where it provides:

No person shall accept payment or other consideration for goods or services where, at the time of the acceptance:

(a) he intends:

(i) not to supply the goods or services; or

(ii) to supply goods or services materially different from supply as the goods or services in respect of which the payment or other consideration is accepted;

or

(b) there are reasonable grounds, of which he is aware or ought reasonably to be aware, for believing that he will not be able to supply the goods or services within the period specified by him or, if no period is specified, within a reasonable time.<sup>57</sup>

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<sup>54</sup> See further discussion on competition vis a vis consumer protection in Chapter Six.

<sup>55</sup> See discussion in Chapter Three.

<sup>56</sup> Section 6 and 7 of the Act provides for the application of the Act where it limits its application within Tanzania and outside Tanzania where a Tanzania citizen or company is involved.

<sup>57</sup> *Fair Competition Act, 2003* (Cap 285 R.E. 2002) s 23.

These provisions address cases of fraud for offline consumers. However, the success of e-consumers through these provisions seems farfetched. This is because the wording of the provisions does not take into consideration online characteristics. Foremost, the wording of section 23 of the Act is lacking. In particular, the wording: ‘No person shall accept payment or other consideration for goods or services where, at the time of the acceptance...’ limit the offending actions to be those which were carried out at the time of acceptance only. Moreover, the whole section is lacking as fraud presents itself through many elements and can happen at any stage of a transaction, and may not necessarily involve the seller but a third party. The buyer and seller may both fall victims.

In order to cater for e-consumers, the provision needs to be wide enough to cover all aspects of online fraud. Online fraud occurring through spam, malware, spywares and other technological ways that e-consumers are faced with when they transact electronically should be considered.

The available law also does not create an easy environment for e-consumers to safeguard their welfare. Consumers who are aggrieved will have to go to a court of law and prove that the seller did not supply goods or did not supply the goods as described. This may not be easy for e-consumers who may not have any documents or proof of purchase as the whole transaction occurred electronically and no opportunity to print the transactions history was given.

Furthermore, this provision is unlikely to be effective in protecting e-consumers because of its reactive nature. The provision gives opportunity to consumers to seek remedy after they have been defrauded; after the payments have been made and goods have not been received or are different from those purchased. However, this is ineffective in the online world. In the online environment everything moves very fast, and businesses can emerge and disappear or change identities very quickly. Defrauders are on alert to avoid being caught and the current online environment works in their favour. The situation is further complicated when the transaction is cross border and the seller cannot be taken to local courts. Therefore, prompt consumer protection actions are needed and the laws need to be proactive.

It is evident that more comprehensive provisions are needed for protecting e-consumers. These provisions should be straightforward in addressing fraud and should be comprehensive enough to cover all aspects of fraud. Furthermore, these provisions should also include measures that can be taken immediately so as to prevent further damage against the e-consumers. For instance, there should be provisions enabling aggrieved consumers to be able to reverse payments in their accounts, or freeze payments until matters are sorted.<sup>58</sup>

(ii) Misleading actions

The *Fair Competition Act*<sup>59</sup> has addressed the issue of misleading or deceptive conduct. Section 15 deals with misleading or deceptive conduct where it prohibits people in trade from engaging in conduct that is misleading or deceptive or is likely to mislead or deceive. This is a general provision prohibiting misleading or deceptive conduct. Section 16 deals with false or misleading representation in the supply of goods or services. The provision prohibits false or misleading representations of standard, quality, style or model, sponsorship, affiliation and so on.

The Act provides extensive provisions on misleading and deceptive conduct. Whereas section 15 is general, the subsequent provisions (sections 18 to 22) are more specific addressing false or misleading representations in relation to goods, services, misleading business activities and bait advertising. Furthermore, Part IV of the act deals with unfair business practises.

Whereas these provisions provide for misleading and deceptive conduct and seem to be wide enough, they are not comprehensive enough to protect e-consumers in online transactions and are likely to yield unsatisfactory results. This is again due to the characteristics and nature of online environments. Online shops and websites can change information very quickly. Styles and functioning of online shops and websites are different and subtle. The presence of features such as hyperlinks and acceptances through clicks, which are not present in the offline world, brings the need for more

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<sup>58</sup> Recommendations as to the measures to be taken are discussed in Chapter Six.

<sup>59</sup> *Fair Competition Act, 2003* (Cap 285 R.E. 2002) Part III.

comprehensive provisions to address misleading and deceptive conducts.

For instance, e-consumers may not be able to rely on the available provisions of the *Fair Competition Act*, where changing and dynamic website materials are in question. Not only might the materials be changed to a different content, but they may also seem less misleading when conveyed in offline manner. It is only when presented in the online environment to the e-consumer who is under pressure to make quick decisions that the flashing websites, hyperlinked, subtle features, clicking commands and thousands of words to scroll through can be seen to have misleading elements.

It is important to acknowledge that misleading and deceptive conduct in the online world goes beyond words and actions, but incorporates perceptions of the e-consumers not being able to find things and not being able to review each and every word in a website. These need to be reflected in e-consumer protection laws. It is also important these laws should not only respond to the emerging online problems but also offer preventative measures that will safeguard the welfare of the consumers. A good example of this is requiring online businesses to give more information and direction to e-consumers who visit their websites and provide more opportunity to review online transactions.<sup>60</sup>

### (iii) Language

The *Fair Competition Act* does not specifically provide for provisions addressing the problem of language. It does, however, provide for unconscionable conduct.<sup>61</sup> Section 25 provides:

25.-(I) No person shall, in connection with the supply or possible supply of goods or services to a person, engage in conduct that is, in all the circumstances, unconscionable.

(2) ... the Court may have regard to:

(c) whether the consumer was able to understand any documents relating to

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<sup>60</sup> See discussion on measures in Chapter Six.

<sup>61</sup> Ibid Part V.

the supply or possible supply of the goods or services;

(d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the consumer or a person acting on behalf of the consumer by the person in relation to the supply or possible supply of the goods or services.<sup>62</sup>

Whether this provision will be sufficient enough to address the problem of language in online transactions cannot be answered in the affirmative. To be successful under this provision the act has to be one of unconscionable conduct at the time of the transaction. This is to the effect that it unduly influenced the consumer to enter into a transaction that they would not have otherwise if the language was different or understood.

The concerns arising in this scenario is that it is difficult for the e-consumer to allege undue influence caused by language in the online environment due to online transaction characteristics, as well as the extent of the language problem which exist beyond the first stages of entering into a transaction. For instance, information in online pages can change instantly and without protective provisions ensuring e-consumers are updated with any changes and are provided with previous records of the transactions, consumers will not be in a position to allege and prove any online maltreatment. Moreover, language problems are wide and may occur even after a transaction is concluded. A transaction may be undertaken in a language understood by the e-consumers, but the products or services received may not. A product or service may be delivered in a different language, for example, the consumer may not be able to read the instructions, warranties, or any information that accompanies the product.<sup>63</sup>

It can be rightly argued that this provision aimed to cover a situation where documents or information given to the consumer contains technical or legal language and/or is ambiguous or lengthy to the extent of affecting the weaker party; that is the consumer. The provision is not only insufficient for e-consumers but also to the intended consumers as it does not cover all scenarios. A more comprehensive

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<sup>62</sup> Ibid s 25.

<sup>63</sup> See Chapter Three, 3.2.1(b)(iii) for a discussion on this.

provision that will address current language issues facing e-consumers is needed.

(iv) Insufficient information

The issue of insufficient information is highlighted in Part VIII<sup>64</sup> of the Act which provides for product safety and product information. Sections 49 and 50 of the Act provide for product information requirements which include the safety standard information, manufacture information, proclamation of unsafe goods and performance information.

All the above requirements are important in e-consumer transactions. However, the provision is not comprehensive in addressing e-consumer concerns of insufficient information raised in this thesis. For instance, a requirement as to the information on rights and obligations of the consumers is not provided. Information requirements on pricing, especially in currency used and exchange rates is also not provided for.<sup>65</sup> E-consumers need more information regarding their online transactions.<sup>66</sup>

(v) Unreasonable and high charges

The Act does not directly address the problem of unreasonable and high charges. However, it is important to mention Part IV<sup>67</sup> of the Act which deals with unfair business practices and Part V which deals with unconscionable conduct. Section 22 prohibits bait advertising and requires sellers to supply goods or services at the advertised price while section 23 prohibits accepting payments with no intention to supply. Section 24 prohibits harassment and coercion; specifically it prohibits the use of force or undue harassment or coercion. Evidently, problems of unreasonable and high charges, which are unfair business practises, are left out under this part of the Act.

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<sup>64</sup> *Fair Competition Act, 2003* (Cap 285 R.E. 2002) Part VIII.

<sup>65</sup> Issues of insufficient information have been discussed in Chapter Three, 3.2.1(b)(iv).

<sup>66</sup> See further discussion in Chapter Six.

<sup>67</sup> *Fair Competition Act, 2003* (Cap 285 R.E. 2002) ss 22 – 24.

Similarly, Part V dealing with unconscionable conduct does not address problems of unreasonable and high charges in consumer transactions. It is tempting to believe that this unfair conduct may be covered under the general provision prohibiting unconscionable conduct.<sup>68</sup> However, following the ejusdem generis principles of statutory interpretation, the subsequent provisions limit the provision to prohibit use of force, ambiguous or unclear language and unfair tactics to coerce consumers entering into a transaction.<sup>69</sup> Moreover, a court of law tends to address the issue of unconscionable conduct cautiously. In the case of *Commercial Bank of Australia v Amadio*,<sup>70</sup> where the doctrine was said to operate where there is use of unconscientious use of superior position or bargaining power against another person in a disadvantaged position, it was held that mere inequality in bargaining power is not a recognised form of disadvantaged position.<sup>71</sup> Similar views on disadvantage position were held in the case of *S.K Ndugwa v The Baganda Butchers*<sup>72</sup> where the court was of the view that unfair advantage due to weak economic bargaining power or lack of business expertise did not constitute undue influence.<sup>73</sup> The high interest loan charged to the plaintiff was considered merely a hard bargain.<sup>74</sup>

Furthermore, it is unlikely that the current problems of unreasonable and high charges can qualify as unconscionable conduct in a court of law. In order to satisfy this requirement, the elements of unconscionable conduct have to be met; the actions have to be excessive and against the dictates of conscience and so unreasonable and oppressive so as to cause minimum standard of fair dealing. The current problems of unreasonable and high charges may not qualify as unconscionable conduct due to the high degree needed to allege unconscionable conducts in a transaction and hence need to be specifically addressed by the laws. Moreover, it is argued that the concept of

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<sup>68</sup> Ibid s 25(1).

<sup>69</sup> Ibid s 25(2)(3).

<sup>70</sup> (1983) 151 CLR 447; see also Dan Jerker B Svantesson, “Unconscionability” in Consumer E-Commerce’ (2011) 25 *Commercial Law Quarterly* 8, 8-14.

<sup>71</sup> Ibid.

<sup>72</sup> (1985) 6 ULR 150.

<sup>73</sup> The principles relating to undue influence and unconscionable conduct overlap and are related and hence courts tends to consider them together in some cases. In the case of *National Commercial Bank (Jamaica) Limited v Hew* [2003] UKPC 51, it was held that ‘undue influence is one of the grounds on which equity intervenes to give redress where there has been some unconscionable conduct on the part of the defendant. It arises whenever one party has acted unconscionably by exploiting the influence to direct the conduct of another which he has obtained from the relationship between them.’

<sup>74</sup> Other interesting cases to note here are *C.H Patel v Pankaj S. Thakore* [1965] EA 629, which establishes further elements to prove unfair disadvantage and *Royal Bank of Scotland plc v Etridge (no 2)* [2001] UKHL 4 which reflects the current developments on the subject.



unconscionable conduct is ‘ultimately subjective’<sup>75</sup> and ‘it is always difficult to determine whether or not a person has acted unconscionably.’<sup>76</sup>

(vi) Mistakes and errors

The *Fair Competition Act* has not addressed the issue of mistakes and errors.

(vii) Spam

The issue concerning spam is not addressed in the Act and available provisions in the Act cannot be used to address any concerns that e-consumers face due to spam.

(viii) Unfair terms and conditions

Unfair terms and conditions are not directly addressed in the Act. However, the Act provides for provisions on unconscionable conduct.<sup>77</sup> These provisions may be applied in instances of unfair terms and conditions. However, the provisions do not render satisfactory protection to e-consumers. This is because the provisions are generally addressing unconscionable conduct, and therefore e-consumers are left to prove whether the unfair terms and conditions are unconscionable conduct. Whereas proving unconscionable conduct through unfair terms and conditions may be less complicated in offline transactions, it is more complicated in online transactions.<sup>78</sup>

In order to prove unconscionable conduct, one has to prove that the conduct is unfair or unreasonable and goes against good conscience. This may not be easy to prove in online transactions simply because there are different scenarios between online and offline proposition, presentation, and acceptance of terms and conditions. Online practice has new features with different practices and whereas these new features may

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<sup>75</sup> John W Carter, ‘The Commercial Side of Australian Consumer Protection Law’ (2010) 26 *Journal of Contract Law* 221, 242; Svantesson. above n 70, 8-14.

<sup>76</sup> Carter, above n 75.

<sup>77</sup> *Fair Competition Act*, 2003 (Cap 285 R.E. 2002) Part V.

<sup>78</sup> Svantesson, above n 70, 8-14.

be detrimental to e-consumers and the end result unfair, the actual actions through these features may not qualify as unconscionable conducts, for example, the use of hyperlinks. The use of presenting terms and conditions through hyperlinks is an acceptable act; however, this action is likely to yield undesirable results for e-consumers.<sup>79</sup>

This is especially where e-consumers are not aware of the hyperlinks, as these links can be inconspicuous and easily missed and in situations where no express agreement is required to show acceptance of the terms and conditions. In some scenarios, using a website is taken as an indication of acceptance of terms by e-consumers, even where the terms were not expressly presented to the website user. Apart from adequate notices and presentation, the terms and conditions may be presented in such a length that e-consumers may not easily scroll down to read and understand all terms and conditions before making a quick decision.

Furthermore, in online transactions, the transactions are not in writing (hard copy), and even the history of the transaction page may disappear or instantly change leaving the e-consumer without any proof of transaction. Moreover, e-consumers may be discouraged from pursuing such matters due to the cumbersome procedures, which get more complicated when a transaction is cross border. Moreover, in jurisdictions where e-commerce and online transactions are not adjudicated such as in Tanzania, e-consumers may lack a forum where they can pursue these matters.<sup>80</sup>

There is no doubt that offline consumers are not faced with such concerns when transacting offline. This sets out the need for specifically and clearly addressing terms and conditions concerns in online transactions.

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<sup>79</sup> See discussion on hyperlinks in Chapter Three, 3.2.1 (b)(viii).

<sup>80</sup> Mambi, above n 1, 13-15.

## 5.3 PROVISIONS REGULATING CONSUMER TO CONSUMER ONLINE TRANSACTIONS

### 5.3.1 *Introduction*

Currently, there are no laws which specifically address online consumer to consumer (C2C) transactions in Tanzania and it is doubtful that the available laws protecting offline consumers will be effective when applied online. This is due to the fact these laws were enacted with a goal of protecting consumers against competition, manufacturers and businesses, in the offline world. The rationale was to protect the consumers who lack equal bargaining power and are vulnerable against the competitive and complicated world of business.<sup>81</sup> This is different from transactions between fellow consumers who are both in similar positions and needing equal protection. In C2C transactions parties in most cases are in similar situations, they both face irrational behaviour, information asymmetries, similar bargaining powers and dominant positions, selling and buying often a necessity rather than business. Moreover, parties may find themselves not qualifying for protection or cover under certain laws and therefore lacking the legal status to litigate under those laws.

Therefore, regulating C2C transactions through business to consumer (B2C) laws may yield unsatisfactory and ineffective results. However, several trade malpractices and infringements also occur in C2C transactions ranging from fraud and misrepresentations to the recognition of parties and the nature of a transaction as the distinctions between consumers and businesses, and consumer and non-consumer online transactions are blurred.<sup>82</sup> All of this calls for specific laws regulating C2C transactions.

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<sup>81</sup> See 'Background to the Consumer Protection in Tanzania' in Ringo Tenga, 'Consumer Protection in Tanzania: Challenges and Prospects for the National Consumer Advocacy Council (NCAC)' (Paper presented at the Fair Competition Commission's Consumer Councils Induction Workshop, Morogoro, 25 April 2008).

<sup>82</sup> For further discussion refer to Chapter Three, 3.2.2.

The following discussion highlights the laws available in Tanzania and whether they address C2C online transaction concerns.

### **5.3.2 Problems in online auctions**

#### **(a) *Tanzania Communications Regulatory Authority Act, 2003 [12 of 2003]***

This Act deals with communications regulations in Tanzania. The Act establishes regulatory authority and assigns the authority powers to regulate the communication industry. The Act is limited to telecommunications, broadcasting and postal services. The Act also regulates relations between customers of telecommunication services and service providers. However, the Act has not addressed any issues concerning C2C transactions, specifically issues arising in online auctions. Issues such as the role and liabilities of the intermediaries in online auctions, the anonymous nature of online auctions, limitation of rights, integration of B2C and C2C in C2C transactions, shill bidding, cancellation and retraction of bids, automatic bidding and multiple functioning feature of online auctions are not addressed in the Act.

It is evident that consumers who transact in C2C transactions will not be able to be successful in seeking relief through this Act as they are not addressed.

#### **(b) *The Tanzania Communications (Consumer Protection) Regulations, 2005***

This Regulation is limited to consumers who are having problems with licensed service providers described in the Act as licensees or operators.<sup>83</sup> The Regulation narrowly defines the consumers it protects and fails to address protection of consumers in online auctions and other C2C transactions. The Regulation does not address any of the raised concerns occurring in online auctions.

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<sup>83</sup> Section 3 of the Regulation defines 'licensee' to mean an entity licensed by the Authority to provide and /or facilitate provision of postal or electronic communication services. Also referred to as the 'Operator'

(c) *Electronic and Postal Communications Act, 2010* [3 of 2010]

This is a recent Act which has tried to address recent issues in electronic communications. However, as pointed out in previous discussions, the Act has not addressed issues of online consumers and provisions of the Act do not satisfactorily protect online consumers' welfare. The same is true as far as C2C online transactions are concerned, as the discussion below will show.

The Act has provisions for regulating service providers. A service provider, who is also referred to as a licensee is required to provide services according to the conditions given in the Act, which includes providing quality services, consumer protection, emergence services, directory assistance and interconnection among other things.<sup>84</sup> The Act also provides for content regulations which prohibit indecent, obscene, false, menacing or otherwise offensive contents from the licensees so as to protect children, discourage the commission of crime from content provided by content service licensees, present comprehensive, accurate and impartial news, present religious material in a balanced and responsible manner, protect the public against offensive and harmful content, prevent communication methods or techniques that communicate a message to viewers or listeners, or otherwise influence their minds, without their being aware, or fully aware, of what has occurred, or that has the potential for doing so.<sup>85</sup>

Despite being useful, these provisions are limited. They are limited in application as they only apply to licensees of content providers in the country which includes internet service providers, television and radio broadcasters. They are also limited in content as not all concerns have been addressed. For instance, apart from expressing interest in protecting children, they do not offer specific provisions with requirements that they must protect children. Similarly, they do not set out responsibilities of the service providers. Due to this limitation, the Act does not address issues of concerning online consumers. Concerns arising from C2C transactions such as the role and liabilities of the intermediaries are not addressed.

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<sup>84</sup> *Electronic and Postal Communications Act, 2010* [3 of 2010] s 17.

<sup>85</sup> *Ibid* s 103 -105.

**(d) *Fair Competition Act, 2003 (Cap 285 R.E. 2002)***

This Act aims to protect consumers against unfair trade practices in Tanzania. However, the Act does not satisfactorily address online consumer protection. Furthermore, issues arising in online auctions among C2C transactions have not been addressed in the Act.<sup>86</sup> Issues such as the role and liabilities of the intermediaries in online auctions, the anonymous nature of online auctions, limitation of rights, integration of B2C and C2C in C2C transactions, shill bidding, cancellation and retraction of bids, automatic bidding and multiple functioning feature of online auctions are not addressed in the Act.

There are general provisions in the Act which appear to offer C2C consumers the ability to seek remedies under them. However, this is not the case as the Act addresses malpractices conducted by the suppliers, businesses and manufacturers but does not cover consumers who are selling their pre-owned and used goods to their fellow consumers. Provisions regulating issues provided under Part VII of the Act entitled 'Manufacture's Obligations' such as unsuitable goods, false descriptions, non-correspondence with the sample and after sale support will not apply reasonably in C2C transactions as the seller is not a manufacturer. Similarly, provisions on implied conditions in consumer contracts under Part VI of the Act, product safety provisions under Part VIII, and product recall provisions under Part IX cannot be applied in C2C transactions due to the nature of the transactions; consumers are both sellers and buyers.

It can be concluded here that the Act was enacted at the time where the phenomenon of C2C online transactions did not exist; and hence the Act was aimed at regulating offline transactions only. Therefore it lacks satisfactory provisions to regulate C2C online transactions. Consequently, consumers who engage in C2C transactions are not protected.

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<sup>86</sup> Issues of concern arising in online auctions include: the role and liabilities of the intermediaries in online auctions, the anonymous nature of online auctions, limitation of rights, integration of B2C and C2C in C2C transactions, shill bidding, cancellation and retraction of bids, automatic bidding and multiple functioning features of online auctions.

(e) *The Sales of Goods Act, 1931* [18 of 1931, Cap 214 R.E. 2000]

This Act governs private relations among parties involved in sales. Even though this is not a consumer protection statute, it is necessary to discuss it here for two reasons. First, because little is covered in consumer law, consumers who engage in C2C transactions are left with the option of using private law in cases of grievance. This may seem appropriate especially among the legal arena as these laws regulate relations and set principles among parties involved in the sales of goods. Second, this Act sets out principles to be followed in offline auctions. As there are no laws regulating online auctions it is necessary to discuss the available offline auction principles and see how or whether they can be applied online. The discussion below will highlight to what extent the *Sales of Good Act* protects consumers who engage in C2C online transactions.

The Act regulates sales of goods contracts in offline transactions. The Act's limit to its offline application is evidenced by the requirement provided in its provisions that all contracts should be in writing and signed.<sup>87</sup> Furthermore, the Act defines goods to include all chattels personal other than things in action and money, emblements, industrial growing crops, and things attached to or forming part of the land, which are agreed to be severed before sale or under the contract of sale.<sup>88</sup> This definition limits what should be considered goods and excludes some of the goods sold online such as software, electronic books, audio materials and so forth. It is evident that online consumers, including C2C consumers are unlikely to successfully seek remedy under this Act as the nature of their transactions are not recognised under this law, and the products they may have bought do not qualify as goods under the Act.

The Act also regulates sales through auctions. It provides that a sale by auction is complete when the auctioneer announces its completion by the fall of the hammer or in other customary manner, and until such announcement is made any bidder may retract their bid.<sup>89</sup> It is clear that this provision was intended for offline auctions where parties are face-to-face and goods are physical. There is difficulty in applying

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<sup>87</sup> *The Sales of Goods Act, 1931* [18 of 1931, Cap 214 R.E. 2000] s 6.

<sup>88</sup> *Ibid* s 2.

<sup>89</sup> *Ibid* s 59.

this provision to online auctions as the mode in which they operate is different, parties are not physically in the same place, potential buyers may not have a good opportunity to examine the goods and it is impossible to conclude the transaction by a 'fall of a hammer'. As online auctions are new inventions they are not regulated under the available provisions under the *Sales of Goods Act*.

Furthermore, it is likely that some of the provisions of the Act are likely to cause controversy and put online consumers in more vulnerable positions. A good example of this is a provision which states that a sale by auction 'may be notified to be subject to a reserved or upset price, and a right to bid may also be reserved expressly by, or on behalf of, the seller.'<sup>90</sup> It further provides that where a right to bid is expressly reserved, the seller or any one person on their behalf may bid at the auction.<sup>91</sup>

The act of a seller bidding on the auction is detrimental in online auctions. Through such acts, the seller can easily manipulate the price of online auctioned goods. As online auctions are private and bidders may not know the identity of other bidders, they may believe that a product is popular or of a higher value as it receives higher or more bids, not knowing that a seller or someone on his /her behalf is bidding. Moreover, there can be little control of the number of people who will be bidding on behalf of the seller. Unscrupulous sellers may have more than one person bidding on their behalf so as to have financial gain. The detrimental act whereby a seller bids on their own goods is known as shill bidding.<sup>92</sup> Whereas it is okay to have reserved price online auctions, it is problematic to allow sellers to bid on their own behalf.

Another provision that may not yield good results in online auctions is that which states that bids can only be retracted before the auction is completed.<sup>93</sup> Whereas this may be a general rule, there is a need to have exceptions in online auctions. This is due to the fact that sellers may change descriptions or conditions at any time without the knowledge of the buyer, and the buyer may only find out after the conclusion of the auction. As there is no physical examination prior to the bidding, the buyer depends on the information that the seller gives, including descriptions and photos,

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<sup>90</sup> Ibid s 59(d).

<sup>91</sup> Ibid s 59(2).

<sup>92</sup> See further discussion of Shill bidding in Chapter Three, 3.2.2 (b)(v).

<sup>93</sup> *The Sales of Goods Act, 1931* [No 18 of 1931, Cap 214 R.E. 2000] s 59(b).



and hence changes to any such information is likely to affect the buyer's decision in bidding on the goods.

It is evident that specific measures to address C2C online consumer concerns are needed. The provisions of the Act are limited to offline transactions and cannot be successfully applied to online transactions, and some of the provisions are not favourable when applied to online transactions. Furthermore, issues that face C2C consumers are not addressed under this Act.<sup>94</sup>

Clearly, measures needed for C2C e-consumer protection go beyond those needed for B2C e-consumers. This is due to the different characteristics and nature of the two transactions.<sup>95</sup> Hence, having B2C online transaction measures alone is not sufficient and still leaves C2C e-consumers unprotected.

### ***5.3.3 Problems in online social networks sales***

The situation regarding regulation of online social network sales in Tanzania is similar to that of online auction sales. The available statutes do not address the problems that arise from these transactions and the available provisions are inadequate and insufficient in addressing issues arising from online social network sales. It is evident that clear laws are needed to address concerns arising from these transactions.

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<sup>94</sup> There are no provisions addressing the role and liabilities of the intermediaries in online auctions, the anonymous nature of online auctions, limitation of rights, integration of B2C and C2C in C2C transactions, and automatic bidding and multiple functioning features of online auctions.

<sup>95</sup> Refer to C2C e-consumer protection discussion in Chapter Six.

## 5.4 PROBLEMS ARISING DURING THE PERFORMANCE PHASE OF ONLINE CONSUMER TRANSACTIONS

### 5.4.1 *Business to consumer online transactions*

#### (a) *The Tanzania Communications Regulatory Authority Act, 2003 [12 of 2003]*

This Act does not provide for some of the issues raised such as non-delivery and late delivery, partial sale or delivery, interoperability and after sale support. There is mention of confidentiality and information handling in the Act. The extent the provision covers e-consumers is discussed below.

##### (i) Handling of personal information

Section 24 of the Act provides for confidentiality of material disclosed by any person. The provision provides:

24. - (1) For the purposes of this Act, any person who gives or discloses any material to the Authority, whether under compulsion of law or otherwise, that person may claim confidentiality in respect of the whole or any part of the material.

(2) The Authority shall set out procedures and publish in the Gazette on how it will disclose its confidential materials or information.

(3) Any person who discloses confidential information otherwise than as authorized by the Authority, commits an offence.<sup>96</sup>

It is evident from the wording that the provision is limited and addresses only material and information submitted to the Authority. It does not even guarantee confidentiality to telecommunication consumers who submit confidential information or materials to

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<sup>96</sup> *Tanzania Communications Regulatory Authority Act, 2003 [12 of 2003] s 24.*

the Authority but rather sets out powers for the Authority on confidential matters. According to the above provision, the Authority has the power to set out procedures on how it discloses its confidential materials or information. The Act does not provide for any procedure for handling personal information or other matters of confidentiality. As far as protection of e-consumers is concerned, the Act has not addressed personal information handling concerns.

**(b) *The Tanzania Communications (Consumer Protection) Regulations, 2005***

Similar to the previous Act, these regulations do not address some issues such as non-delivery and late delivery, partial sale or delivery and interoperability. Furthermore, as discussed<sup>97</sup> these regulations are limited to telecommunication consumers only and telecommunication is addressed as a product, not a medium. Therefore, users of phone and internet services and products are covered by the regulations, however, e-consumers are not. This is further evidenced in the discussion below.

**(i) After sale support**

Part II of the regulations provides for requirements of customer care systems where regulation four provides:

4.-(1) Each licensee shall establish a customer care system within which customers can make inquiries and complaints.

(2) Electronic communication operators shall establish a customer care system within six months from the date of being licensed by the Authority.

(3) Postal operators shall establish a customer care system immediately within three months from the date of being licensed by the Authority after being granted a licence by the Authority.<sup>98</sup>

It is clear from the wording that these provisions are limited to licensees and operators

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<sup>97</sup> See section 5.2.1(b) above.

<sup>98</sup> The Tanzania Communications (Consumer Protection) Regulations 2005, r 4.

of electronic communication and postal services. The regulations go further and define a licensee to mean ‘an entity licensed by the Authority to provide and /or facilitate provision of postal or electronic communication services. In the Regulations he is also referred to as the ‘operator’.<sup>99</sup> There is no doubt that regulations do not cover e-commerce transactions, hence e-consumers cannot rely on the e-sellers’ obligations to provide customer care on the basis of these regulations.<sup>100</sup>

It is important to note that if the provision were applicable to e-transactions, it would still be insufficient in addressing after sale support concerns, as what is needed, not only by e-consumers but all consumers in general, is more than a customer care system. Consumers need an effective and accessible customer care system which will resolve their concerns. There is a need to establish clear and practical rights and obligations for both consumers and sellers/service providers which are available after the conclusion of a transaction.

## (ii) Handling of personal information

The regulations provide for a confidentiality provision where it states that:

A licensee shall not monitor or disclose the content of any information of any customer transmitted through the licensed systems, except as required or permitted by any written laws in force.<sup>101</sup>

Again, this provision is useful, but is limited to customer grievances with their telecommunication service providers. E-consumers are not covered under this provision. Furthermore, the provision is limited in its context; it does not cover all issues concerning the handling of personal information. With today’s technological developments, specific provisions, such as those addressing data collection awareness and consent from the consumers, data access by the consumers, data storage security, data encryption, data integrity and modification, trans-border data flow, cookies, and

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<sup>99</sup> Ibid r 1.

<sup>100</sup> For further discussion on whether these provisions are satisfactory enough for intended audience refer to 5.2.1(b) above.

<sup>101</sup> The Tanzania Communications (Consumer Protection) Regulations, 2005, r 12.

minimum standards of data storage, are essential.<sup>102</sup> Consumers also need to have a part in data handling procedure. For example, they should be given the opportunity to choose the information they would like to give to their providers. Data collection should not be mandatory, unless specifically required by law, and this should be reflected in consumer protection provisions.

Furthermore, data monitoring may also be required in order to protect consumers. For instance, whereas monitoring consumer activities and their information is wrong, monitoring spam, spyware and other malware posted in electronic environment is essential so as to protect consumers.

Moreover, there is a need for effective implementation of regulations and laws so as to successfully protect consumers. Despite the above regulation on information confidentiality, telecommunication consumer confidentiality is still breached.<sup>103</sup> This shows a failure in the implementation of the law and a need to revise the system so that it effectively protects consumers.

It is evident from the discussion above that the provided regulation on confidentiality does not only render little protection to e-consumers, but it is also insufficient for the targeted consumers.

### **(c) *Electronic and Postal Communications Act, 2010* [3 of 2010]**

As pointed out above, the Act does not address e-consumer concerns. The Act has focused on regulating telecommunication service providers; however, there are other general provisions which address telecommunication consumers. These are mentioned here to shed light on the efforts of the *Electronic and Postal Communication Act* to determine whether these provisions are satisfactory enough to be adopted for e-consumers.

The Act does not address issues of non-delivery and late delivery or partial sale or

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<sup>102</sup> These issues have been discussed in Chapter Three and Chapter Six.

<sup>103</sup> Refer to the discussion in Chapter Three, 3.3.1(b)(v).

delivery. There is a provision on interoperability.<sup>104</sup> The Act requires all those who operate, manage and provide network services in the country to have interoperable and compatible systems that will work with other network service licensees systems. This is a major regulatory effort as such a requirement did not previously exist. However, the requirement is not broad enough to be fully enjoyed by telecommunication consumers. The provision requires network systems to be interoperable and compatible but it does not mention telecommunication consumer devices and services. Whereas consumers may be able to benefit from interoperability between two network service providers, allowing them to connect with other consumers of different networks, it does not guarantee that other services will also be available. A good example of this is the mobile money services offered by the telecommunication service providers. Moreover, the interoperability advocated under the Act is limited to connection between the telecommunication service providers as the provision does not provide for interoperability with other devices such as computers.

The Act also addresses the issue of after sale support where individual licence holders are required to follow terms and conditions of the licence which includes enabling any subscriber to obtain assistance, regarding amongst other things, accessing services, setting up calls and remedying faults, and customer services.<sup>105</sup> However, the provision is not satisfactory.<sup>106</sup>

## 5.5 PROBLEMS ARISING IN PAYMENTS FOR ONLINE CONSUMER TRANSACTIONS

### **5.5.1 Business to consumer online transactions**

There are several concerns which e-consumers face regarding payments on online transactions. There are no specific laws addressing electronic payments or any other issues raised that e-consumers face in online payments. The discussion below will examine current offline laws to see to what extent they address the raised concerns.

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<sup>104</sup> *Electronic and Postal Communication Act, 2010* [3 of 2010] s12(2).

<sup>105</sup> *Ibid* s17- 8.

<sup>106</sup> See the above discussion on the *Electronic and Postal Communications Act*.

Some of the available consumer laws which have been mentioned above have not addressed issues of payments and hence will not be included in this discussion. These include; the *Tanzania Communications Regulatory Authority Act*, The Tanzania Communications (Consumer Protection) Regulations, 2005, *Fair Competition Act*, and *Sales of Goods Act*.

**(a) *The Bank of Tanzania Act, 2006* [4 of 2006, CAP 197 R.E. 2002]**

This is an Act which establishes the Bank of Tanzania (BOT) and provides duties and regulations of the Bank under its provisions. It is necessary to mention this Act here even though it does not deal with consumer regulations. This is because the Act establishes the Central Bank of Tanzania which is vested with powers to regulate all other banks, financial institutions and payments systems amongst others.<sup>107</sup>

The Bank has the function of regulating, monitoring and supervising the payment, clearing and settlement systems including all products and services, conducting oversight functions on the payment, clearing and settlement systems in any bank, financial institution or infrastructure service provider or company.<sup>108</sup> Furthermore, the Act gives powers to the Bank to: participate in any such payment, clearing and settlement systems; establish and operate any system for payment, clearing or settlement purposes; and perform the functions assigned by or under any other written law for the regulation of payment, clearing and settlement systems.<sup>109</sup>

The provisions of the Act also vest the Bank with other powers such as those of the banker and fiscal agent of the government. The Bank deals with issuance of money, exchange rates and all other finance matters.<sup>110</sup>

Even though the BOT is overseer of all finance matters in the country, it had no

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<sup>107</sup> *The Bank of Tanzania Act, 2006* [4 of 2006, CAP 197 R.E. 2002] s5.

<sup>108</sup> *Ibid* s 6(1).

<sup>109</sup> *Ibid* s 6(2).

<sup>110</sup> *Ibid* Part IV.

provision for regulating online or mobile payments services until very recently<sup>111</sup> when it enacted the Guidelines on Agent Banking for Banking Institutions, 2013. These guidelines aim to regulate banking institutions and their agents and to provide a framework for conducting agent banking business in Tanzania.<sup>112</sup> The regulations provide for approval to businesses to conduct agent business,<sup>113</sup> for permissible activities for such agents<sup>114</sup> and regulation of the agency relationship.<sup>115</sup> The guidelines also provide for matters of governance and the operational requirements of service providers and their agents.<sup>116</sup> These are commendable efforts, as regulation of agents of bank institutions play an important role in consumer protection. The guidelines address the gap in financial institution regulation which had previously existed. However, these Guidelines do not address e-consumers concerns raised in this thesis.

It is revealed that Tanzania lacks broader legislation of payment systems. The BOT had issued Electronic Payment Scheme Guidelines of 2007; however, these only addressed and covered risk management for banks and other financial institutions.<sup>117</sup>

It can be argued that things have not changed and there is still a big gap in regulating financial activities from mobile phone service providers. This is not only for e-consumers but general consumers in Tanzania. There is a need for extensive measures addressing this area. Mobile payments and operations are widening every day and if they remain unregulated, consumers are likely to suffer.

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<sup>111</sup> The regulations were issued in February 2013 by the Directorate of the Banking at the Bank of Tanzania.

<sup>112</sup> Guidelines on Agent Banking for Banking Institutions, 2013, s 2, 4.

<sup>113</sup> Ibid Part III.

<sup>114</sup> Ibid.

<sup>115</sup> Ibid Part IV.

<sup>116</sup> Ibid Part V, VI.

<sup>117</sup> Simone di Castri and Lara Gidvani, *Enabling Mobile Money Policies in Tanzania: A "Test and Learn" Approach to Enabling Market-Led Digital Financial Services* (February 2014) 6 <<http://www.gsma.com/mobilefordevelopment/wp-content/uploads/2014/03/Tanzania-Enabling-Mobile-Money-Policies.pdf>>.



**(b) *The Banking and Financial Institutions Act, 2006* [5 of 2006, CAP 342 R.E. 2002]**

This Act aims to provide comprehensive regulation of banks and financial institutions in the country. It provides for regulation and supervision of the activities of banks and other financial institutions.

The Act gives the BOT the power to grant licences, carry out inspections over the operations of all banks or financial institutions, and requires any bank or financial institution to furnish any information or to comply with any order, directive or determination issued or made by the Bank pursuant to all the powers of the Bank conferred under the Act.<sup>118</sup> The objective of such powers is supervision and regulation of banks and financial institutions so as to maintain the stability, safety and soundness of the financial system and to reduce the risk of loss to depositors.<sup>119</sup>

This Act is valuable as it vests the BOT with powers to enact rules and regulate the playing field. The Act itself does not provide for regulation of e-transaction payments or mobile and online payments in consumer transactions.

**(c) *Electronic and Postal Communications Act, 2010* [3 of 2010]**

The Act does not address payment issues such as the involvement of multi-intermediaries. However, there are some provisions which are worth noting even though they have been mentioned in different scenarios above. These provisions are discussed below.

**(i) Extra and high transaction costs**

The Act provides for prices where it states that electronic communications licensees, for the application services and content services which they provide to the public, may

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<sup>118</sup> *The Banking and Financial Institutions Act, 2006* [5 of 2006, CAP 342 R.E. 2002]

s 4.

<sup>119</sup> *Ibid* s 5.

set and revise such prices as they deem appropriate. This provision is restricted to the service costs of communication providers and hence does not sufficiently address e-consumer concerns raised in the thesis.

There is a need for specific provisions which address e-consumer concerns in online payments, in particular prices and costs they incur during payments. These provisions should ensure certainty to e-consumers and also enable them to make informed decisions.

## (ii) Insecure payment systems

The Act has addressed the issue of security where it establishes a National Computer Emergency Response Team (CERT). It has the role of coordinating the response to cyber security incidents at the national level and cooperating with regional and international entities involved with the management of cyber security incidents.<sup>120</sup> Establishing the CERT is a commendable effort in responding to cybersecurity issues. However, these efforts are limited and fall short of addressing e-consumers concerns arising out of e-transactions.

The Act prohibits unauthorised access or use of a computer system or its data, disruption or denial of service or changing computer system hardware, firmware, or software without the owner's knowledge, instruction, or consent. The Act provides further that any person who secures unauthorised access to a computer or intentionally causes loss or damage to the public or any person, destroys, deletes or alters any information in the computer resources or diminish its value or utility or affects it injuriously by any means, commits an offence.<sup>121</sup>

These are useful provisions for e-consumers as they guarantee a certain degree of cyber security in general. However, the provisions are too general and fail to address the security concerns occurring in online transactions that e-consumers face, especially during the payment phase. There is a need for specific provisions to guarantee certainty in e-payments. For example, provisions which clearly set

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<sup>120</sup> *Electronic and Postal Communications Act, 2010 [3 of 2010]* s 124(1).

<sup>121</sup> *Ibid* s 124(3).

obligations for both payment service providers and e-consumers, measures to be taken in case of security infringement or fraud, and specific measures that payment service providers should take. Services such as charge back also need to be provided.

## CHAPTER SIX

### 6. INITIATIVES FROM OTHER JURISDICTIONS AND LESSONS TO BE DRAWN

There are many initiatives which address the concerns of electronic consumers (e-consumers) worldwide. Several of these address issues that are similar to Tanzania; whereas other issues peculiar to Africa<sup>1</sup> or Tanzania have not been addressed.<sup>2</sup> These initiatives range from all levels of jurisdictions such as domestic, regional, and global. This chapter will examine selected initiatives available at all levels. However, the discussion will be limited to specific initiatives that have addressed the issues raised in the thesis.

Not all identified initiatives will be discussed as some are similar to others, whilst others may contain common provisions that do not warrant special discussion. In instances where initiatives available are silent and do not address a particular issue; no discussion will be carried out regarding the initiatives. Interest is focused on provisions which directly address e-consumer protection, although in some instances other supporting laws of related issues may be discussed in an effort to point out further the rationale of related provisions.

This is out of recognition that there are numerous efforts around the world addressing

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<sup>1</sup> Ntozintle Z Jobodwana, 'E-Commerce and Mobile Commerce in South Africa: Regulatory Challenges' (2009) 4 *Journal of International Commercial Law and Technology* 294; Philip Esselaar and Jonathan Miller, 'Towards Electronic Commerce in Africa: A Perspective from Three Country Studies' (2001) 2 *Southern African Journal of Information and Communication* 4; Balancing Act, *New Study Provides Reality Check on Uptake of E-Commerce In Africa* (2009) Issue no 160 <<http://www.balancingact-africa.com/news/en/issue-no-160/digtool/new-study-provides-r/en#sthash.wSmT7e4j.dpuf>><http://www.balancingact-africa.com/news/en/issue-no-160/digtool/new-study-provides-r/en>.

<sup>2</sup> There are several African e-commerce ventures such as: <http://www.samite.com>, <http://www.jumia.com.ng/>, <http://ghanabeads.com/>, <http://www.kivuko.com/>, <http://www.bidorbuy.co.za/>, <http://www.kalahari.com/>, <http://www.botswanacraft.bw/>, <http://www.eshopafrika.com/>. See Chris Tredger, 'Top African E-Commerce Websites', *IT News Africa* (online), 11 April 2013 <<http://www.itnewsafrika.com/2013/04/top-african-e-commerce-websites/>>; Shaun Lake, 'E-commerce and LDCS Challenges for enterprises and Governments' (Paper presented at UNCTAD Regional Meetings on Electronic Commerce and Development, Kathmandu, Nepal, 30-31 May 2000) 12-14.

information communication technology (ICT) in general and e-commerce and consumer protection in particular; however, whilst the subjects may be similar, the intention of these initiatives may be different to e-consumer protection. A good example of this is initiatives recognising e-signatures. Whereas such initiatives may be relevant to e-consumers, they are not part of the concerns raised in this thesis and hence will not be emphasised. The need to limit the discussion to the relevant subject does not mean that the excluded discussions are irrelevant to e-consumers but rather recognition that they can be addressed under other branches of law. It also portrays the recognition of limiting discussion on e-consumers concerns. This limitation will be further reflected in the discussion carried out in various subchapters of this thesis.

Some general provisions, which impose a condition in general, will be avoided so as to avoid repetition. The focus will be on finding potential measures which may be used to address the problems Tanzanian e-consumers face. For example, when addressing the problem of fraud, a general provision that requires e-consumers be provided with transaction information<sup>3</sup> will not be discussed, despite it being useful in combating fraud. This is because while the requirement may help prevent fraud through consumer awareness, such general requirements do not help to address the issues, instead, specific direction is needed. To elaborate this point further, article 5 of the European Union (EU) *Directive on Electronic Commerce* is highlighted under fraud initiatives at the regional level below.<sup>4</sup>

This thesis will take into consideration all authoritative, legal, regulatory and guiding principles addressing ICT e-commerce issues, regardless of their value in law (binding, persuasive, regulating, guiding etc).<sup>5</sup> It is the principle set forth that will be emphasised with regard to how it will be effective for Tanzanian concerns.

It is evident that the internet is borderless and e-consumers violations happening in

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<sup>3</sup> See, eg, *Directive on Electronic Commerce* [2000] OJ L 178, p 1, art 5.

<sup>4</sup> Refer to the discussion on the EU *Directive on Electronic Commerce* in below.

<sup>5</sup> See the position of Tanzania regarding foreign laws in Chapter Five, where international treaties or codes of conducts are applicable after being ratified in accordance with article 63 of the *Constitution of the United Republic of Tanzania, 1977* (as last amended by Act No. 1 of 2005); and English applicable before the 22 of July 1920 are also applicable in Tanzania in accordance with Section 2.3 of *The Judicature and Application of Laws Act* [CAP 358 R.E. 2002]. Other foreign laws and initiatives hold a persuasive value in the Tanzanian legal system.

different part of the world are similar. This is true to the extent that international lawmakers agree there is a need for global rules which govern internet activities.<sup>6</sup> This was expressed by the United Nations Commission on International Trade Law (UNCITRAL) Working Group III (Online Dispute Resolution (ODR)) who were preparing rules for global consumer dispute resolution at their thirtieth session in 2014.<sup>7</sup> They stated that given the borderless nature of the internet, applying different sets of procedural rules depending on the nationality of one disputing party would be commercially impractical for ODR entities and unlikely to happen in practice.<sup>8</sup> It is with this in mind, that available initiatives such as the EU Directives addressing e-commerce and the Organisation for Economic Co-operation and Development (OECD) initiatives, among others, will be considered in this thesis; regardless of their jurisdiction or level of development. However, the reality of e-commerce in Tanzania and the experience of Tanzania e-consumers will be kept in mind, while considering measures that will work in Tanzania or are relevant to the Tanzania context.

It is argued that the current e-consumer situation in Tanzania is unique, with integration of mobile phone services and mobile commerce (m-commerce), distinctive consumer to consumer (C2C) electronic transactions (e-transactions), the new emerging roles of e-consumers and small and medium enterprises (SMEs), cultural integration, language diversity and insufficient basic protection for even offline consumers.<sup>9</sup> Consequently, a new e-commerce paradigm for Tanzania exists. It is doubtful that available e-commerce measures in the world can address all the issues surrounding Tanzanian e-consumers. However, relevant measures can be identified and modified to work within the Tanzanian scenario.

This discussion will highlight the available measures at a global level, regional level and country level (see Figure 6.1) and will reflect how these measures can fit within Tanzania. Furthermore, the discussion in this chapter takes into consideration

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<sup>6</sup> UNCITRAL Working Group III (Online Dispute Resolution), 'Report of Working Group III (Online Dispute Resolution) on the work of its thirtieth session' (Vienna, 20-24 October 2014) <[http://www.uncitral.org/uncitral/commission/working\\_groups/3Online\\_Dispute\\_Resolution.html](http://www.uncitral.org/uncitral/commission/working_groups/3Online_Dispute_Resolution.html)>; Jenny Clift, 'UNCITRAL and the Goal of Harmonization of Law' (Paper presented at Jurisdiction: Building Confidence in a Borderless Medium, Montreal, Canada, 26 – 27 July 1999).

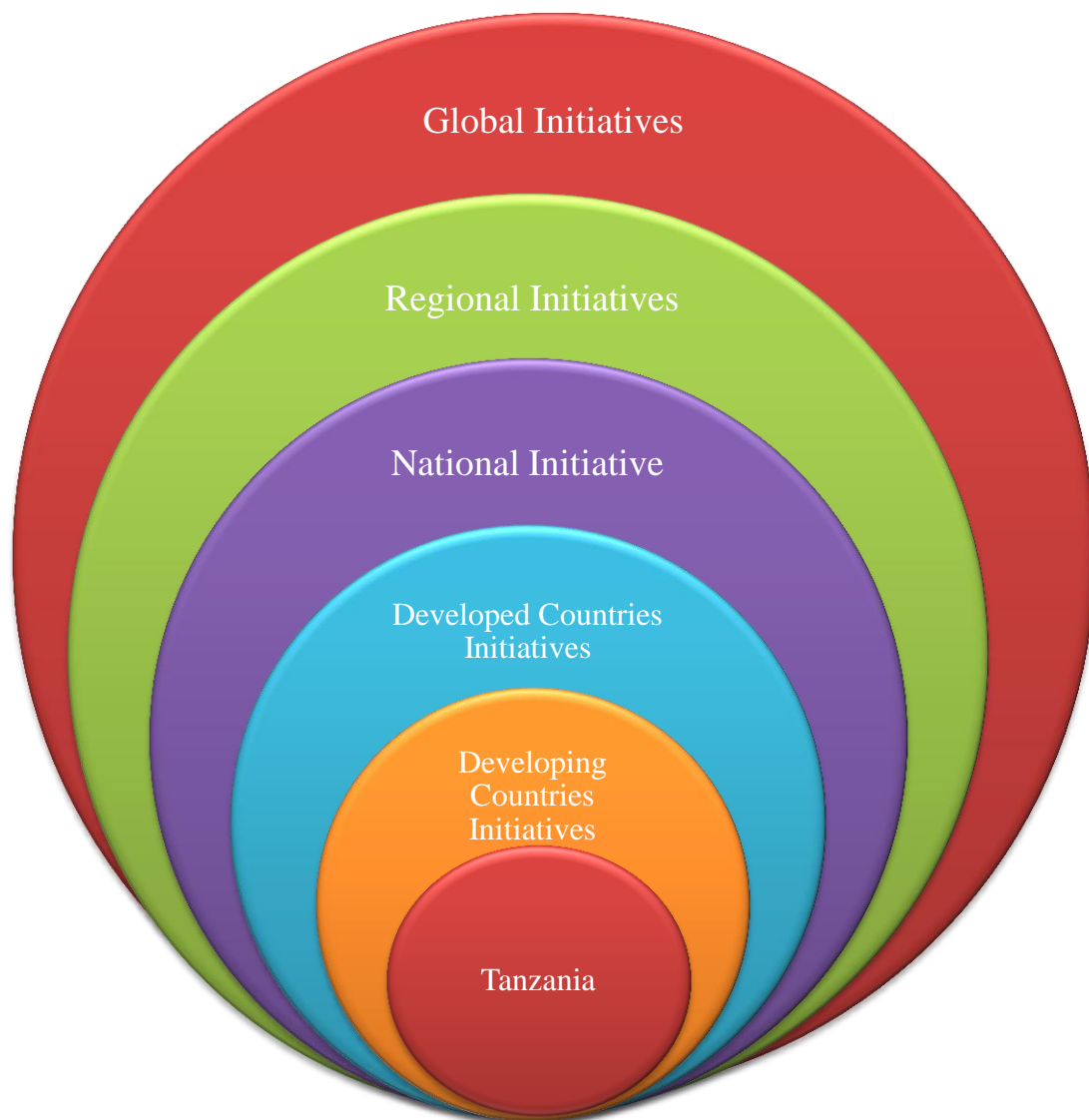
<sup>7</sup> UNCITRAL Working Group III (Online Dispute Resolution), above n 6.

<sup>8</sup> Ibid.

<sup>9</sup> Further discussion on these unique features is carried in Chapter One and Two of the thesis.

countries at various levels of development and economy. For instance, initiatives from countries relevant or similar to the Tanzanian social, economic and political culture are considered. Thus efforts from developing countries, being directly influential to Tanzania laws are considered, together with initiatives from developed world. Below is a brief note on these measures at different levels.

**Figure 6.1 Structure of Discussion on Available Initiatives Addressing E-Consumer Concerns**



## *Global level*

There are numerous efforts undertaken by international organisations to address ICT and electronic related issues at the global level. These are organisations such as the United Nations Commission on International Trade Law (UNCITRAL),<sup>10</sup> International Chamber of Commerce (ICC),<sup>11</sup> Comité Maritime International (CMI),<sup>12</sup> and the International Institute for the Unification of Private Law (UNIDROIT).<sup>13</sup> In this chapter only initiatives from UNCITRAL will be highlighted.<sup>14</sup> This is because some of these other initiatives do not regulate consumer contracts or auctions,<sup>15</sup> hence they are not included in the discussion.

However, due to a lack of sufficient initiatives addressing e-consumer concerns and the important guidance that can be derived from the provisions of the available initiatives, exceptions will be made and discussion will be carried out on some instruments which do not deal with consumer issues but still shed light on general e-commerce concerns. This is necessary because understanding guiding principles and concepts offered by these initiatives will assist in deliberating measures for e-consumers.

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<sup>10</sup> *United Nations Convention on the Use of Electronic Communications in International Contracts*, opened for signature 23 November 2005, UN Doc A/60/515 (entered into force 1 March 2013); *UNCITRAL Model Law on Electronic Signatures*, GA Res 56/80, 56<sup>th</sup> sess, Agenda Item 161, UN Doc A/RES/56/80 (24 January 2002, adopted 5 July 2001); *UNCITRAL Model Law on Electronic Commerce*, GA Res 51/162, 51<sup>st</sup> sess, Agenda Item 148, UN Doc A/RES/51/162 (30 January 1997, adopted 12 June 1996).

<sup>11</sup> *ICC General Usage for Internationally Digitally Ensured Commerce (GUIDEC) Rules 1997*; *Incoterms – International Commercial Terms 2000 - 2010* (ICC); the *Supplement to the Uniform Customs and Practice for Documentary Credits for Electronic Presentation ('eUCP')* 2002.

<sup>12</sup> *Comité Maritime International (CMI) Rules for Electronic Bills of Lading 1990*.

<sup>13</sup> The UNIDROIT Principles of International Commercial Contracts 2004 *UNCITRAL Arbitration Rules*, 31 UN GAOR Supp No 17, UN Doc A/31/17 (1976); The UNIDROIT Principles of International Commercial Contracts 2010 *UNCITRAL Arbitration Rules*, 65 UN GAOR Supp No 17, UN Doc A/65/17 (2010).

<sup>14</sup> Some of the UNCITRAL initiatives have addressed concerns raised in this thesis and are more relevant to the current discussion.

<sup>15</sup> For example the *United Nations Convention on Contracts for the International Sale of Goods (CISG)*, opened for signature 11 April 1980, 1489 UNTS 3 (entered into force 1 January 1988) art 2; the *United Nations Convention on the Use of Electronic Communications in International Contracts*, opened for signature 23 November 2005, UN Doc A/60/515 (entered into force 1 March 2013) art 2.



## *Regional level*

There are several organisations and initiatives which have addressed, or are in the process of addressing, e-commerce and consumer protection at the regional level.<sup>16</sup> These include the OECD,<sup>17</sup> EU,<sup>18</sup> Association of Southeast Asian Nations (ASEAN), Asia-Pacific Economic Cooperation (APEC), the Economic Community of West African States (ECOWAS),<sup>19</sup> the South African Development Community (SADC)<sup>20</sup> and the East African Community (EAC).

The extent to which each address e-commerce and e-consumer concerns varies greatly. Some have extensively addressed the subject while others are still in discussion and implementation stages.<sup>21</sup> Most of the measures in place have been influenced by international rules and guidelines such as those set under UNCITRAL. Specific initiatives from these organisations will be used for this discussion. Other initiatives which do not directly address e-consumer protection or are similar to other international instruments will not be discussed.

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<sup>16</sup> There are more regional organisations than mentioned below. Only a few with visible efforts in electronic commerce will be mentioned.

<sup>17</sup> *OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data 1980*.

<sup>18</sup> The Council of Europe's *Convention on Cybercrime*, opened for signature 23 November 2001, ETS No 185 (entered into force 1 July 2004).

<sup>19</sup> *ECOWAS Legal framework on e-transactions* (Supplementary Act A/SA.2/01/10); *Convention on Cybercrime*, above n 18; *ECOWAS Personal Data Protection framework* (Supplementary Act A/SA.1/01/10).

<sup>20</sup> *The Declaration on Information and Communications Technology 2001 (SADC); Model Law on Electronic Transactions and Data Protection 2003*; May 2010.

<sup>21</sup> For example, among the participating countries in ECOWAS, only two have electronic transaction laws aligned with the regional framework, see UNCTAD, *UNCTAD Helps West African Countries Harmonize Cyber Laws* (23 February 2014) <[http://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=701&Sitemap\\_x0020\\_Taxonomy=Technology%20and%20Logistics;#1952;#e-Commerce%20Legislation;#1713;#Information%20and%20Communication%20Technologies;#20;#UNCTAD%20Home](http://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=701&Sitemap_x0020_Taxonomy=Technology%20and%20Logistics;#1952;#e-Commerce%20Legislation;#1713;#Information%20and%20Communication%20Technologies;#20;#UNCTAD%20Home)>. It is reported there is no general guidance for online consumer protection in ASEAN to date. However, there is an active Consumer Protection Committee. See UNCTAD, *Review of E-Commerce Legislation Harmonization in the Association of Southeast Asian Nations* UN Doc UNCTAD/DTL/STICT/2013/1 (25 September 2013) <<http://unctad.org/en/pages/PublicationWebflyer.aspx?publicationid=623>>. The EAC is currently working on establishing electronic laws. Some countries such as Uganda have taken initiatives to address electronic issues but there are still few efforts towards e-consumer protection in most member states. See UNCTAD, *Harmonizing Cyber laws and Regulations: The Experience of the East African Community* UN Doc UNCTAD/DTL/STICT/2012/4 (23 October 2012) <<http://unctad.org/en/Pages/Publications/Cyberlegislation.aspx>>.

### ***National level***

Several countries have addressed the e-commerce and consumer protection issues. Discussion at this level will take into consideration several countries' initiatives in both the developed and developing world. Countries portraying similarities in political, social and economic status and practice will be considered. Also efforts in countries which have addressed e-consumer concerns will be highlighted. The discussion will take care to avoid repetition. This is especially so as there are numerous efforts at a national level which have implemented measures available from the international level and hence are very similar or the same. With this in mind, the approach will be to discuss the best available provisions in the selected countries and among the regional initiatives.

#### **6.1 INITIATIVES ADDRESSING PROBLEMS IN FORMATION OF ELECTRONIC CONSUMER TRANSACTIONS**

##### ***6.1.1 Business to consumer (B2C) online transactions***

###### **(a) Fraud**

Fraud in Tanzania has different characteristics unique to the Tanzanian environment. This is due to the nature of e-commerce that exists in Tanzania, elaborated further under South African fraud initiatives discussed below. This will highlight how Tanzania's situation differs to South Africa and other African countries; and to emphasise the need for specific measures protecting Tanzania e-consumers.

###### **(i) Initiatives at the global level**

There are no specific provisions addressing e-consumer concerns regarding fraud.

Both the *UNCITRAL Model Law on Electronic Commerce*<sup>22</sup> and the *United Nations Convention on the Use of Electronic Communications in International Contracts*<sup>23</sup> have provisions which may be referred to in cases of fraud; however, there is a lack of provisions directly dealing with fraud for the purpose of this discussion.

(ii) Initiatives at the regional level

There are no specific provisions addressing fraud at this level either; however, it is necessary to mention general provisions which may be used in cases of fraud and highlight their insufficiencies. This discussion is carried out so as to emphasise a point raised at the introduction of this chapter on the insufficiency of general provisions and why they will be avoided under the chapter. A provision from the EU *Directive on Electronic Commerce*<sup>24</sup> is highlighted below.

***Directive on Electronic Commerce***

Article 5 of the EU *Directive on Electronic Commerce* has a general provision requiring transaction information to be provided to e-consumers. This provision is relevant for dealing with fraud because information to e-consumers may assist in the prevention of fraud by making consumers aware of a transaction. However, the generality of such a provision makes it less effective in preventing fraud. There is a need for a specific requirement for information which aims directly to protect against fraud. Similar provisions also need to offer guidelines and to provide direction for fraudulent acts in e-consumer transactions.

It is essential to consider to what extent a provision deals with fraud, as information alone does not stop crime, and may not give guidelines or direction in cases of fraud. A comprehensive provision is needed for e-consumer protection against fraud. It is also essential to note that e-consumers may face fraud at any stage of a transaction;

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<sup>22</sup> GA Res 51/162, 51<sup>st</sup> sess, Agenda Item 148, UN Doc A/RES/51/162 (30 January 1997, adopted 12 June 1996).

<sup>23</sup> Opened for signature 23 November 2005, UN Doc A/60/515 (entered into force 1 March 2013).

<sup>24</sup> *Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the internal market ('Directive on Electronic Commerce')* [2000] OJ L 178, p 1.

being offered fraudulent goods at the beginning of a transaction or after the conclusion of a transaction, such as through identity theft.<sup>25</sup> Therefore, the information requirement needs to be comprehensive to cover these scenarios.<sup>26</sup> One way this can be done is to require specific provisions, including information to e-consumers, which may prevent a certain fraudulent act at a certain stage.

A good example of how further information or elaboration on provisions may be drawn from the provisions of the United States Uniform Commercial Code (UCC).<sup>27</sup> The UCC is structured in a way that, apart from its provisions, it also contains further sections elaborating the given provisions. These extra sections are termed official comments and commentaries which elaborate on the requirement of the provisions provided under the UCC. The UCC also offers references to other related available laws addressing issues raised in the provision.

This arrangement was strongly influenced by the need for the UCC to succeed. It is contended that the success or failure of the UCC depended much on how it would be interpreted as a true Code.<sup>28</sup> A true Code is defined as 'self-explanatory, a pre-emptive, systematic, and comprehensive enactment of a whole field of law.'<sup>29</sup> It is further contended that:

under the true code approach a court should look no further than the code itself for solution to disputes governed by it-its purposes. Problems in interpreting code language not defined within the code explicitly also would be resolved by reference to the Code's purposes and policies.<sup>30</sup>

This approach was taken into consideration keeping in mind that that 'no law or set of laws can exist in isolation, and that some reference to outside law would at times be

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<sup>25</sup> Refer further discussion on this under the Initiatives at the National Level below.

<sup>26</sup> The caution of information overload discussed under the Initiatives at National level below should also be considered here.

<sup>27</sup> It is noted that UCC is a national initiative which does not regulate e-consumers transactions. However, it is necessary to mention it here as its structure and the basis of its formation sheds light on an approach that may be used to address fraud and other e-consumer concerns. The provisions of the UCC are not considered any further for the purpose of this thesis under this Chapter.

<sup>28</sup> Robert Hillman, 'Construction of the Uniform Commercial Code: UCC Section 1-103 and "Code" Methodology' (1977) 18 *Boston College Industrial and Commercial Law Review* 655.

<sup>29</sup> Ibid 657.

<sup>30</sup> Ibid. See also section 1-102(1) of the Uniform Commercial Code.

inevitable.’<sup>31</sup>

There is no doubt that adopting the structure of the UCC and the philosophy governing it as highlighted above will bring potential results in Tanzania e-consumers protection initiatives. Lessons that can be drawn from the UCC go beyond its structure and philosophical foundations and consider how the Code continues to be developed through reviews and revisions to accommodate new developments in the areas of concern.<sup>32</sup> This is particularly essential in the field of e-commerce which is fast developing.

(iii) Initiatives at the national level

***Electronic Communications and Transactions Act 2002 (South Africa)***

South African initiatives in e-commerce may be seen as important initiatives to be followed by other African countries such as Tanzania. This is due to the fact that like other African countries, South Africa has similar economic, political, social and cultural conditions. Therefore, the laws enacted on e-commerce may reflect these conditions. For instance, consideration of economically disadvantaged consumers may be useful for other African countries that have similar groups of consumers. However, this is not entirely true for Tanzania. Not only because South Africa is more economically and technologically advanced than Tanzania; but also as mentioned previously that due to the fact that e-commerce in Tanzania has been adopted with its own unique features and practises resulting in a model of e-commerce particular to Tanzania. Issues arising from this model of e-commerce need to be specifically addressed. The incorporation of m-commerce and mobile phone payments in e-commerce and the growing use of social networks and media to conduct e-commerce need a special address.

Other economic and social structures and practices have also resulted in unique

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<sup>31</sup> Hillman, above n 28, 658. See also section 1-103 of the Uniform Commercial Code.

<sup>32</sup> David M Steingold, *What is the UCC?* (April 2013) Nolo <<http://www.nolo.com/legal-encyclopedia/what-is-the-ucc.html>>.

features in the e-commerce scenario, for instance, the availability of fibre cables has resulted in new fraudulent actions emerging with new pattern and high volume in Tanzania; and possibly this is the case with some of the African countries which share access to fibre cables.<sup>33</sup> This needs to be considered when addressing fraud issues facing e-consumers in Tanzania. Issues concerning C2C e-transactions and SMEs involvement also need to be addressed in light of the Tanzanian scenario. Furthermore, there are provisions in the South African *Electronic Communications and Transactions Act 2002* which may not be sufficient in addressing e-consumer transactions. These provisions will be revealed in the various discussions on the Act below. There is no doubt that if adopted in its entirety, the South African *Electronic Communications and Transactions Act 2002* will not sufficiently address e-consumer concerns in Tanzania.

However, this does not mean that South African initiatives are not useful to Tanzania. Some of the provisions may be adopted and incorporated as shown in the discussion below.

Section 43 of the *Electronic Communications and Transactions Act 2002* (South Africa) requires information to be provided. The Act requires a supplier who is offering goods or services for sale, hire or exchange by way of an electronic transaction, to offer certain information to consumers during the course of the transaction. This information should include: the full name of the business; its legal status, physical address, telephone number, website address and e-mail address; membership of any self-regulatory or accreditation bodies it may belong to and the contact details of that body; any code of conduct to which the business subscribes to and how that code of conduct may be accessed electronically by the consumer.<sup>34</sup>

The provision also requires business to: offer its registration number; the names of its office bearers and its place of registration; the physical address where that supplier will receive legal service of documents; a sufficient description of the main characteristics of the goods or services offered by that supplier to enable a consumer

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<sup>33</sup> Michael Murungi, 'Identity-Related Crimes: A Profile of East Africa from a Kenyan Perspective' (Paper presented at the 5<sup>th</sup> meeting of the Core Group of Experts on Identity-Related Crime, Vienna, Austria, 6-8 December 2010)

<sup>34</sup> *Electronic Communications and Transactions Act 2002* (South Africa) s 43.

to make an informed decision on the proposed electronic transaction; the full price of the goods or services, including transport costs, taxes and any other fees or costs; the manner of payment; any terms of agreement, including any guarantees, that will apply to the transaction and how those terms may be accessed, stored and reproduced electronically by consumers; the time within which the goods will be dispatched or delivered or within which the services will be rendered; the manner and period within which consumers can access and maintain a full record of the transaction; and the return, exchange and refund policy of that supplier.<sup>35</sup>

The business is also required to inform the consumer of the alternative dispute resolution code they are subscribed to and how to access the code; the security procedures and privacy policy in respect of payment, payment information and personal information; the minimum duration of the agreement in the case of agreements for the supply of products or services to be performed on an ongoing basis or recurrently; the rights of consumers available with regard to the transactions.<sup>36</sup>

The provision is important as providing e-consumers with all the required information will not only alert them in case it is a fraudulent transaction but it will make them more aware of the nature of the transaction and enable them to make informed choices. Despite the provision having extensive information requirements, it is also faced with information overload challenges.<sup>37</sup> It can be argued that it confront the consumers with the 'wading through a mass of detail and sorting the wheat through the chaff.'<sup>38</sup> E-consumers are provided with complex detailed information; this will require a considerable amount of effort for consumers to absorb.<sup>39</sup>

This challenge can be met with an act of balance. E-consumers need to be informed; however, in a way that they will be able to easily receive and understand the

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<sup>35</sup> Ibid.

<sup>36</sup> Ibid.

<sup>37</sup> See Anthony Duggan and Ian Ramsay, 'Front End Strategies for Improving Consumer Access to Justice' in Michael Trebilcock, Lorne Sossin and Anthony Duggan (eds), *Middle Income Access to Justice* (University of Toronto Press, 2012) 108; Yu-Chen Chen, Rong-An Shang and Chen-Yu Kao, 'The Effects of Information Overload on Consumers' Subjective State Towards Buying Decision in the Internet Shopping Environment' (2009) 8 *Electronic Commerce Research and Applications* 48. <<http://www.sciencedirect.com/science/article/pii/S1567422308000367>> accessed on 1/4/2014;

<sup>38</sup> Duggan and Ramsay, above n 37.

<sup>39</sup> Ibid.

information; for example, instead of browsing through the information and clicking ‘I agree’ or accepting even where they have no understanding of what is written, the requirement should be for the available information on a website to be short and succinct, and for further details to be provided as a reference. These details should merely expand on the information provided and not include new additional, important information which would affect the decision-making of the e-consumer if it was seen before a transaction was concluded.

Moreover, this problem may be addressed through technical aspect by providing consumers with internal information filters and search tools where individual e-consumers may search for information they require within a particular website.<sup>40</sup>

The problem of information overload may also be addressed by empowering e-consumers rather than merely informing them. To this effect, the aim should be to educate consumers. The provision of the South African *Electronic Communications and Transactions Act* and others with similar requirements may be adopted with this in mind.

Other parts of the above provisions need to be modified to fit the Tanzanian environment and reflect the actual practices in the community. For instance, where it provides for the manner of payments; in order to be effective in Tanzania, this provision needs to be extended to address mobile phone payments. Sellers may be required to offer certain information in case the payments are carried out through mobile phone companies.<sup>41</sup> Some of the information requirements from the provision which are not applicable in the Tanzanian scenario should be ignored.<sup>42</sup> There is a need to ensure the scope of application of such provisions, the targeted audience and possibly the manner which may be carried out or which may satisfy implementation of such provisions are clearly and certainly stated; something which is lacking in the South African *Electronic Communications and Transactions Act*.<sup>43</sup>

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<sup>40</sup> Chen, Shang and Kao, above n 37, 48.

<sup>41</sup> These requirements will be discussed further in the section discussing payments below.

<sup>42</sup> For instance, the requirement in Section 43(1) (r) to state the rights of consumers in accordance with Section 44 is not applicable in Tanzania.

<sup>43</sup> Tana Pistorius, ‘The Legal Effect of Input Errors in Automated Transactions: The South African Matrix’ (2008) 2 *Journal of Information Law & Technology* 2  
<[http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/2008\\_2/pistorius2/#a2](http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/2008_2/pistorius2/#a2)>.



Similarly, section 51 of the *Electronic Communications and Transactions Act*<sup>44</sup> which provides for principles of protection of consumer information can be highlighted when addressing fraud. Among the conditions provided are the requirements of express written permission from the consumer before collecting data, to ensure that the data collected is for the purpose of the transaction engaged with the consumer, and that the consumer has to be informed of the purpose for which any personal information is being collected, data collected should not be used for any other purpose (without the express written permission of the data subject) other than the disclosed purpose, data collected to be kept for one year, and the need to delete or destroy all data collected when it becomes obsolete.<sup>45</sup>

These provisions are more direct in data protection than protection from fraud and are discussed further under the Personal Information Handling section below. However, it is essential to note here that e-consumers' personal information needs to be protected so as to protect them from fraud issues such as identity theft. It is important to ensure that there are specific provisions encouraging e-sellers to be responsible when collecting and handling e-consumer's information. These provisions need to be practical and applicable, taking into consideration that e-sellers have limited capacity and control in data security.<sup>46</sup> Section 51 of the *Electronic Communications and Transactions Act* does not reflect this as it sets out requirements which may not be realistic to e-sellers and may not render the intended protection to e-consumers; especially in C2C transactions. Hence, the provision will not be effective at protecting e-consumers against fraud nor in protecting e-consumers with personal information concerns. Questions one might ask about this provision are; what constitutes 'express written permission' in the online world and how can e-consumers prove they gave consent?

In order to understand the difficulty of this provision, it is necessary to seek examples from initiatives from other jurisdictions, which have dealt with similar issues. It is

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<sup>44</sup> The provision sets out rules on collecting, handling and disclosure of personal information.

<sup>45</sup> *Electronic Communications and Transactions Act 2002* (South Africa) s 51.

<sup>46</sup> The *Electronic Communications and Transactions Act 2002* (South Africa) defines 'data controller' to mean any person who electronically requests, collects, collates, processes or stores personal information from or in respect of a data subject.

necessary to highlight initiatives from other jurisdiction which have discussed the question, what constitutes ‘express written permission’? For this reason initiatives under the EU are discussed here so as to shed light on the problem surrounding the highlighted provision from South Africa. The difficulty of the South Africa provision is seen through the EU data law making process where the EU Commission’s ‘express given and written’ consent requirements were later amended to ‘freely given’, ‘informed’ and unambiguous’ which aimed to ensure that a data subject had to take an action to signify their agreement allowing their personal data to be processed.<sup>47</sup> The requirement for written consent was replaced with ‘explicit consent’. These changes were made to ‘allow the general principles to be applied in an efficient and non-bureaucratic way in keeping with the wide variety of ways in which data are processed.’<sup>48</sup>

These requirements continue to be the centre of debate among lawmakers<sup>49</sup> and it is argued that ‘there continues to be active disagreement among (EU) Member States on the appropriate form that consent must take in various contexts and how to interpret such key terms as “explicit” and “unambiguous”.’<sup>50</sup> It is further argued that ‘[t]he Article 29 Working Party on search engines in April 2008 helped fuel the current debate over obtaining consents online, but stopped short of suggesting a suitable method for obtaining such consent.’<sup>51</sup> It is contended that the requirement of express consent is too onerous in practice.<sup>52</sup>

It is contended that in practice, ‘it is not obvious how the consent is actually informed and achieved.’<sup>53</sup> It is also argued that the ‘disclosure of fully informed consent is neither definable nor achievable; and even if it could be provided; there is little

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<sup>47</sup> European Commission Justice, Article 29 Data Protection Working Party, *Opinion 15/2011 on the Definition of Consent* (01197/11/EN WP187, 13 July 2011) <[http://ec.europa.eu/justice/policies/privacy/workinggroup/wpdocs/2011\\_en.htm](http://ec.europa.eu/justice/policies/privacy/workinggroup/wpdocs/2011_en.htm)>.

<sup>48</sup> Ibid.

<sup>49</sup> London School of Economics and Political Science Working Group on Consumer Consent, *From Legitimacy to Informed Consent: Mapping Best Practices and Identifying Risks: A Report from the Working Group on Consumer Consent* (May 2009) 40 – 43 <[www.lse.ac.uk/management/documents/Report-on-Online-Consent.pdf](http://www.lse.ac.uk/management/documents/Report-on-Online-Consent.pdf)>.

<sup>50</sup> Ibid.

<sup>51</sup> Ibid.

<sup>52</sup> Nuria Pastor, ‘Position of Spain on the General Data Protection Regulation: Flexibility, Common Sense and Self-Regulation’ on *Privacy and Information Law Blog* (7 March 2013) <<http://privacylawblog.ffw.com/category/consent-2/page/2>>.

<sup>53</sup> Eleni Kosta, *Consent in European Data Protection Law* (Martinus Nijhoff, 2013) 219.

chance of its comprehensive assimilation.’<sup>54</sup>

The provisions requiring explicit consents have proved to be difficult to implement in practice and businesses have confused the obtaining of consent with providing a right to ‘object, implied consent or default consents, such as pre-ticked opt in boxes.’<sup>55</sup> It has been expressed that the attempt to ‘fulfil this requirement has resulted into the development of increasingly complex, lengthy and incomprehensible consent forms.’<sup>56</sup>

It is essential that lawmakers learn from these experiences and take into consideration the difficulties others have faced by imposing such requirements. There is a need to find alternatives that will be effective, practical and easy to implement.

The requirement that data be kept for one year as stated in section 51, or any other number of years proposed by lawmakers, may be detrimental to both e-sellers and e-consumers. Businesses, especially SMEs, are more inclined to use easy and affordable data storage systems and facilities such as cloud computing.<sup>57</sup> Cloud computing is an internet-based model of computing enabling various services such as computer power, storage, servers, software applications, operating systems and other similar services.<sup>58</sup> Utilisation of such systems gives sellers less control of data storage.<sup>59</sup> Moreover, for small business owners, who cannot afford to employ expensive data storage systems but rather utilise cloud computing; such a requirement may be a burden as it may result in them having to store a large volume of data which incurs extra expenses.

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<sup>54</sup> Ibid.

<sup>55</sup> Paula Barrett and Liz Fitzsimmons, *Data Protection – Implied Default Consent Not Valid* Eversheds (9 August 2008)

<[http://www.eversheds.com/global/en/what/articles/index.page?ArticleID=en/Retail/Data\\_Protection\\_implied\\_default\\_consent\\_not\\_valid](http://www.eversheds.com/global/en/what/articles/index.page?ArticleID=en/Retail/Data_Protection_implied_default_consent_not_valid)>.

<sup>56</sup> Kosta, above n 53.

<sup>57</sup> Maria Giannakaki, *The EU Data Protection Directive Revised: New Challenges and Perspectives* (2011), 1-4 <[www.kalaw.gr/wmt/userfiles/papers\\_184-giannakaki-full\\_text-en-v001\(2\).pdf](http://www.kalaw.gr/wmt/userfiles/papers_184-giannakaki-full_text-en-v001(2).pdf)>.

<sup>58</sup> Ibid; European Commission Expert Group Report, *The Future of Cloud Computing – Opportunities for European Cloud Computing Beyond 2010* (January 2010)

<<http://cordis.europa.eu/fp7/ict/ssai/docs/cloud-report-final.pdf>>; Peter Mell and Timothy Grance, ‘The NIST Definition of Cloud Computing: Recommendations of the National Institute of Standards and Technology’ (2011) *National Institute of Standards and Technology, Special Publication 800-145* <<http://csrc.nist.gov/publications/nistpubs/800-145/SP800-145.pdf>>; Dan Svantesson and Roger Clarke, ‘Privacy and Consumer Risks in Cloud Computing’ (2010) 26 *Computer Law and Security Review* 391-7.

<sup>59</sup> Giannakaki, above n 57, 3-5.

Similarly, e-consumers may be affected by such a provision as it imposes on them a condition where their data will be available in storage for a prescribed time. This may deny e-consumers the right to delete information collected on them. The issue of consumer data retention has been the subject of much discussion lately; specifically, the consumer's 'right to be forgotten.'

The discussion on the 'right to be forgotten' became prominent in 2012 when the European Commission released a proposal for a new Data Protection Regulation.<sup>60</sup> This proposal was approved by the European Parliament on 12 March 2014.<sup>61</sup> The approved EU Data Protection is yet to be adopted by the EU Council, however, it is highly likely that the right to be forgotten will soon be embedded under EU regulations.<sup>62</sup>

The issue of the 'right to be forgotten' has also been discussed in the case of *Google Spain SL v Agencia Española de Protección de Datos (AEPD) Mario Costeja González*.<sup>63</sup> In this case, the complainant, Mario Costeja, found that a google search result revealed his information contained in a newspaper announcing an auction of his property due to social security debts from 15 years earlier.<sup>64</sup> He wanted Google to delete this sensitive information. This was affirmed by the Spanish courts resulting in Google challenging the decision in the European Court of Justice in March 2012.<sup>65</sup> On the 13<sup>th</sup> May 2014, the European Court of Justice held that an internet search engine (Google) must consider requests from individuals to remove links to freely accessible web pages resulting from a search on their name; especially in cases where the search results appear to be 'inadequate, irrelevant or no longer relevant or excessive in the

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<sup>60</sup> European Commission, *Proposal for a Regulation of the European Parliament and of the Council on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data (General Data Protection Regulation)* (COM (2012) 11 final, 2012/0011 (COD), Brussels, 25 January 2012 ), art 15 <<http://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:52012PC0011>>.

<sup>61</sup> Max Smolaks, *European Parliament Approves EU Data Protection Regulation Draft* (12 March 2014) TechWeekEurope <<http://www.techweekeurope.co.uk/news/new-eu-data-protection-regulation-draft-approved-141369>>.

<sup>62</sup> Ibid.

<sup>63</sup> [2013] EUECJ (C-131/12); Juliette Garside, 'Google Does Not Have to Delete Sensitive Information, Says European Court', *The Guardian* (online), 26 June 2013 <<http://www.theguardian.com/technology/2013/jun/25/google-not-delete-sensitive-information-court>>.

<sup>64</sup> Garside, above n 63.

<sup>65</sup> Ibid.

light of the time that had elapsed.’<sup>66</sup>

It is evident that provisions which address data and personal information protection are important in addressing concerns of fraud. Changes in initiatives in other jurisdictions should be used to highlight possible ways to address the issue. Moreover, special efforts ensuring the protection of e-consumers need to be taken, especially at a time where anti-terrorism laws attempt to target and monitor online activities.<sup>67</sup>

### ***The Computer Misuse Act 2011 (Uganda)***

The Computer Misuse Act addresses new challenges brought about by advances in technology. The Act is useful as it provides for security of data and documents; and introduces several computer offences and crimes. Unlike Uganda, Tanzania lacks such laws up to date. However, the Act is limited both for the purpose of this study and protection it renders to Ugandan citizens; as its emphasis is more on computer crimes and misuse acts. The Act does not directly address issues of e-consumer protection. However, some of its general provisions may be used as guidance for addressing concerning issues in e-consumer protection. This will be shown in the discussion below.

Section 19 of the Act provides for computer fraud. This provision may be modified to cater for electronic fraud in electronic transactions, in particular, consumer transactions. The wording: ‘A person who carries out electronic fraud commits an offence’ may be adopted. However, the focus should be more on producing a consumer protection provision rather than a criminal law provision.<sup>68</sup> Moreover, the definition of electronic fraud needs to be modified to fit e-consumer concerns in the

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<sup>66</sup> *Google Spain SL v Agencia Espanola de Proteccion de Datos (AEPD) Mario Costeja Gonzalez* [2013] EUECJ (C-131/12).

<sup>67</sup> Ben Grubb, ‘Terror Laws Clear Senate, Enabling Entire Australian Web to be Monitored and Whistle-Blowers to be Jailed’, *Sydney Morning Herald* (online), 25 September 2014 <<http://www.smh.com.au/digital-life/consumer-security/terror-laws-clear-senate-enabling-entire-australian-web-to-be-monitored-and-whistleblowers-to-be-jailed-20140925-10m8ih.html>>; Natasha Lomas, ‘UK Government Pushes IP-Matching In Latest Digital Counter-Terror Measure’, *Crunch* (online), 23 November 2014 <<http://techcrunch.com/2014/11/23/ip-matching/>>; Patrick Wintour, ‘UK ISPs to Introduce Jihadi and Terror Content Reporting Button’, *The Guardian* (online), 14 November 2014 <<http://www.theguardian.com/technology/2014/nov/14/uk-isps-to-introduce-jihadi-and-terror-content-reporting-button>>.

<sup>68</sup> Further discussion on the role of criminal law in consumer protection is carried out under discussion on initiatives addressing problems arising post formation in e-consumer transactions below.

Tanzanian context. According to section 19, electronic fraud means deception, deliberately performed with the intention of securing an unfair or unlawful gain where part of a communication is sent through a computer network or any other communication and another part through the action of the victim of the offence, or the action is performed through a computer network or both.

This definition need to be broadened for Tanzania where a transaction may be concluded offline even though initiated electronically. Examples of this include electronic transactions where payments are carried out physically or through mobile phones, products are picked up or exchanged offline. It should also take into consideration the nature of e-commerce in Tanzania, which is integrated with m-commerce.

#### **(b) Misleading Actions**

As elaborated in chapter three, e-consumers in Tanzania are faced with various misleading actions. They may include false statements or promises made by sellers regarding the quality and nature of a product, availability, originality, seller's information, association and affiliation of the seller, and similar actions. Moreover, e-consumers in C2C transactions are faced with misleading information regarding endorsements and supports of their family and friends on certain products, and sponsorship, so as to entice consumers to buy their products.

Several other online actions are accountable in misleading e-consumers; these include actions through online features such as hyperlinks and deep links, interactive websites and advertisements, the lack of opportunity to review previous records and a lack of sufficient opportunities to review transactions. Initiatives addressing these issues are discussed below.

(i) Initiatives at the regional level

***EU Directive on Electronic Commerce***<sup>69</sup>

Article 6 of the *EU Directive on Electronic Commerce* requires the nature of the transactions to be clearly stated. Clarity in transaction information is one way of ensuring that e-consumers are not misled and is particularly relevant for Tanzanian e-consumers. For instance, it is important to have specific provisions which require commercial communications to be clearly identified as such, especially in C2C transactions carried out in blogs and social media forums. This provision should be further modified to require commercial information from sponsoring businesses to be clearly identified as such, and it should be clear to the consumers the nature and extent of such sponsorship. It is important for e-consumers to know that most of the businesses sponsoring blogs and similar mediums in Tanzania are supporting the operation of the actual website and not necessarily endorsing the contents published in such sites.

Similarly, promotional offers, gifts, competitions and similar offers should be clearly identified and their conditions made clear to e-consumers so as not to confuse or mislead them.

It is also important to clearly identify a person on whose behalf the commercial communications are made; especially on websites where third parties and intermediaries are involved such as those in C2C transactions.

However, the question to be asked is whether this provision is sufficient enough to protect e-consumers against misleading actions? Simply put, the answer is, no, it is not. It is argued that this provision is redundant and limited; hence it is ineffective in addressing the discrepancy in question.<sup>70</sup> It is argued that even if unsolicited

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<sup>69</sup> *Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the internal market ('Directive on Electronic Commerce')* [2000] OJ L 178, p 1.

<sup>70</sup> Lilian Edwards, 'Articles 6-7 ECD; Privacy and Electronic Communications Directive 2002 – Canning the Spam and Cutting the Cookies: Consumer Privacy Online and EU Regulation' in Lilian Edwards (ed), *The New Legal Framework for E-Commerce in Europe* (Hart Publishing, 2005) 45.

information is labelled as such, this will not protect e-consumers,<sup>71</sup> either from spam or misleading actions. An example of the implementation of this provision can be seen in the UK where similar requirements were imposed but the adopted provision provided little difference in effect.<sup>72</sup>

It is evident that a requirement for information alone is not enough; there is also a need to have specific provisions addressing misleading acts in e-consumer transactions. Provisions worth noting in this regard would be from the *Unfair Commercial Practices Directive*.<sup>73</sup> This is a general law which is not specific to e-consumers; however, it does cater for e-consumers and the approach taken may shed light as to how to respond to e-consumers concerns regarding misleading actions.<sup>74</sup>

The Directive addresses everyday actions which are misleading but may possibly escape being identified as such under current online misleading measures, due to the general nature of such measures.<sup>75</sup> Apart from the general prohibition of unfair commercial practices,<sup>76</sup> and prohibitions of misleading and aggressive practices,<sup>77</sup> the regulations specify 31 specific actions to be banned as they are misleading.<sup>78</sup> Some of the prohibited actions are:<sup>79</sup>

claims that a trader (including his commercial practices) or a product has been approved, endorsed or authorised by a public or private body when the trader, the commercial practices or the product have not or making such a claim

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<sup>71</sup> Ibid.

<sup>72</sup> Ibid. See also Regulations 7 and 8 of *The Electronic Commerce (EC Directive) Regulations (UK)* c 2013 of 2002.

<sup>73</sup> Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('*Unfair Commercial Practices Directive*') [2005] OJ L 149, p 22.

<sup>74</sup> It is acknowledged here that there are myriads of general laws addressing consumer protection; however, the key interests in these discussions are specific initiatives addressing in online transactions and e-consumer protection. Therefore, general consumer protection laws will only be mentioned where it is necessary to do so.

<sup>75</sup> The measures referred here are such as from the EU *Directive on Electronic Commerce* art 6, discussed above and identified as insufficient.

<sup>76</sup> *Unfair Commercial Practices Directive* art 5.

<sup>77</sup> Ibid art 6,7.

<sup>78</sup> *Unfair Commercial Practices Directive* sch 1.

<sup>79</sup> As the Directive is technology neutral, only provisions that directly touch online misleading practices that need to be addressed will be pointed out here.



without complying with the terms of the approval, endorsement or authorisation.<sup>80</sup>

This is an important provision for online transactions, especially in social media (C2C transactions); where approval and endorsements of products from the public or family and friends is a key advertising method and a major way to win e-consumers and gain their trust.<sup>81</sup> There has been a shift in the advertising arena where advertisements are no longer controlled by advertisers and easily recognisable sponsors but rather through user generated content (also known as consumer generated media - CGM).<sup>82</sup> This is also known as 'buzz marketing' where word of mouth (through CGM) is much relied upon.<sup>83</sup> In this scenario, 'advertising messages are developed by advertisers or agent but then controlled and disseminated by the consumers.'<sup>84</sup> It is argued that 'this commercialization of chitchat is most effective when consumers do not even notice the commercial message.'<sup>85</sup>

As a result, online product endorsements and approvals are given in different aspects. In some instances e-consumers are willing to do so out of enticement, such as a free product, being entered into draws and so forth, or being sponsored or paid by businesses;<sup>86</sup> whereas in others, e-consumer offer genuine reviews of their experience. In some scenarios, e-consumer information is used to show approval even without their awareness. One thing for certain, is that, any of these actions results into reactions<sup>87</sup> from e-consumers who respond to the information; without knowing whether they have been misled or not. This method of advertisement and endorsement of products by e-consumers has been so effective that e-consumers were declared 'advertising agent of the year' and 'person of the year.'<sup>88</sup>

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<sup>80</sup> *Unfair Commercial Practices Directive* sch 1(4).

<sup>81</sup> Ellen P Goodman, 'Peer Promotions and False Advertising Law' (2006) 58 *South Carolina Law Review* 683-8.

<sup>82</sup> Brian D Wright, 'Social Media and Marketing: Exploring the Legal Pitfalls of User Generated Content' (2010) 36 *University of Dayton Law Review* 67-8.

<sup>83</sup> Robert Sprague and Mary Ellen Wells, 'Regulating Online Buzz Marketing: Untangling a Web of Deceit' (2010) 47 *American Business Law Journal* 415.

<sup>84</sup> Wright, above n 82, 67-8.

<sup>85</sup> Sprague and Wells, above n 83, 418.

<sup>86</sup> *Ibid* 422-5.

<sup>87</sup> Wright, above n 82, 85.

<sup>88</sup> Goodman, above n 81, 683.

It is essential to enact specific initiatives which address this because it is difficult for consumers to successfully claim misleading actions against a business given there are many factors which influence a consumer on their purchase decision; and hence it may be difficult to prove that it was the misleading actions which influenced the e-consumer's decision.<sup>89</sup> However, it is also important to ensure balance is reached so as not to hinder advertisements in online transactions.

Similar protection is rendered under the Directive, where it bans the use of 'editorial content in the media to promote a product where a trader has paid for the promotion without making that clear or let it be known to the consumer';<sup>90</sup> and describing a product as free or without charge or similar if the consumer has to pay anything other than the unavoidable cost of responding to the commercial practice and collecting or paying for delivery of the item.<sup>91</sup> These provisions also touch on issues that are missing in the enacted initiatives but yet create a big impact in e-consumer misleading concerns. However, there is still a loophole in these provisions; for instance where additional payment is banned in 'free of charge' offers, the provision does not offer protection against unfair high postal and handling charges.<sup>92</sup> These charges may be purposely doubled so as to compensate for the price of the items or other charges that the e-consumer may have incurred in the absence of the 'free' offer.

This is similar to the provision stating that 'creating the false impression that the consumer has already won or will win a prize or other equivalent benefit, when in fact either there is no prize or by taking any action in relation to claiming the prize or other equivalent benefit is subject to the consumer paying money or incurring a cost.'<sup>93</sup> This provision would be of greater benefit if it was more specific.

The Directive makes it unlawful for sellers to:

Falsely claim or create the impression that the trader is not acting for purposes relating to his trade, business, craft or profession, or falsely representing

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<sup>89</sup> Sprague and Wells, above n 83, 427.

<sup>90</sup> *Unfair Commercial Practices Directive* sch 1(11)1.

<sup>91</sup> *Ibid* sch 1(20)1.

<sup>92</sup> Refer to Chapter Three regarding high costs in shipping and handling of goods.

<sup>93</sup> *Ibid* sch 1(31).

oneself as a consumer.<sup>94</sup>

This provision is useful in controlling what is known as ‘stealth marketing’, where businesses reach out and communicate with e-consumers by disguising the originator of the communication.<sup>95</sup> This is because e-consumers are likely to rely on and even seek assistance from their fellow e-consumers whom they trust.<sup>96</sup> Similar to the situations above, it may be difficult for e-consumers to claim misleading actions against such a practice and hence the importance of such issues being specifically addressed.

The Directive further bans persistent and unwanted solicitations by telephone, fax, e-mail or other remote media, except in circumstances and to the extent justified to enforce a contractual obligation.<sup>97</sup> This provision may seem to offer a better solution to spam than the opt in/opt out options provided in the previous discussed Directive.<sup>98</sup> It can be argued that provision enables businesses to reach out for e-consumers and also protects e-consumers from persistent and unwanted solicitations. However, there is a need to make it clear what constitutes persistent and unwanted solicitations.

The implementation of the *Unfair Commercial Practices Directive*<sup>99</sup> at a national level can be seen under the UK’s *Consumer Protection from Unfair Trading Regulations 2008* c 1277, where similar provisions have been adopted. These regulations were put to the test under the case of *Safestyle (UK)*<sup>100</sup> where a homeowner won a case against doorstep double glazing salesmen who ignored the

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<sup>94</sup> Ibid sch 1(22). sch 1(22).

<sup>95</sup> Sprague and Wells, above n 83, 415; Goodman, above n 81, 688.

<sup>96</sup> Sprague and Wells, above n 83, 415.

<sup>97</sup> *Unfair Commercial Practices Directive* sch 1(26).

<sup>98</sup> *Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the internal market ('Directive on Electronic Commerce')* [2000] OJ L 178,

<sup>99</sup> *Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive')* [2005] OJ L 149, p 22.

<sup>100</sup> *North Lincolnshire Council Trading Standards Department vs Safe Style UK* (2001) Scunthorpe County Court (England); Chris Brooke, ‘Death of a (Cold-Calling) Salesman: Homeowner Wins Battle to ban Double-Glazing Firm From Knocking at His Door’, *DailyMail* (online), 4 February 2011 <<http://www.dailymail.co.uk/news/article-1353703/Double-glazing-firm-knocking-door-exasperated-homeowner-landmark-ruling.html>>.

homeowner's request not to visit his house.<sup>101</sup>

In this case, the homeowner had written several letters to the company informing them he did not want to be visited. He decided to press charges under the Regulations after the 12<sup>th</sup> visit.<sup>102</sup> This highlights the point raised above as to what measures persistent and unwanted solicitation. In this case, the complainant had complained about the unwanted visits for four years and had written over three letters.<sup>103</sup> Therefore, there is no doubt that the actions were unwanted. However, similar records and proofs may not be easily obtained in the online environment. Furthermore, with the speed and easy access of internet, one can be contacted more than 10 times a day.

Similar findings were held in *Office of Fair Trading vs Ashbourne Management Services Limited and Others*<sup>104</sup> where sending unwanted letters with threats and using aggressive tactics to members of a gym who cancelled their gym membership before the end of the specified minimum period was held to constitute an aggressive commercial practice.

(ii) Initiatives at the national level

***Trade Practices Amendment (Australian Consumer Law) Act (No. 2) 2010 (Cth)***

Section 18 of the *Australian Consumer Law* provides a general provision prohibiting misleading or deceptive conduct. This provision may be adopted for protection of Tanzania e-consumers. However, the provision should not stand alone; other supporting provisions should be added covering different scenarios of misleading acts in the Tanzanian context. For instance, a non-conclusive list could be provided to prohibit misleading actions occurring through: hyperlinking and deep linking; unclear information published in websites; design and layout of actual website or blogs; publishing foreign currencies; and a lack of full and clear presentation of all

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<sup>101</sup> Ibid.

<sup>102</sup> Ibid.

<sup>103</sup> Ibid.

<sup>104</sup> *Office of Fair Trading vs Ashbourne Management Services Limited and Others* [2011] EWHC 1237 (Ch)

transactional information to e-consumers.

A similar list of prohibited false or misleading representations about goods or services is provided under sections 29 to 38 of the *Australian Consumer Law Act*. These provisions are general provisions which address situations occurring in offline consumer transactions and which may also occur in online consumer transactions. For instance, they prohibit several actions such as false or misleading representation that goods are of a particular standard, quality, value, grade, composition, style or model, or have had a particular history or particular previous use. However, it is important to add specific issues which occur in e-consumer transactions.

### ***Australian Guidelines for Electronic Commerce (March 2006)***

Guidelines 15.1 and 15.2 contain general provisions prohibiting misleading or deceptive conducts and false or misleading representations about the goods or services. These provisions are similar to those within the *Australian Consumer Law Act*.

Guideline 18.1 requires advertising material to be clearly identifiable and distinguishable from other content. Likewise, this provision contains similar wordings to those already discussed.

One of the examples that can be drawn from the *Australian Guidelines for Electronic Commerce* is how effective guidelines and code of conducts can be in regulating the interests of e-consumers. A clear example is where a legal instrument such as the *Australian Consumer Law Act* endorses provisions of the guidelines, which in effect gives the provisions force and recognition. Similar effect can occur where the regulations (or any code of conduct) are highlighted as important and influential guidelines in case laws; especially where there are gaps. Through endorsement by a court of law, the guidelines or codes of conduct gain strength in regulating e-consumers welfare.<sup>105</sup>

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<sup>105</sup> Please refer to Chapter Two for further discussion on self-regulations and codes of conducts.

### (c) Language

Several language problems which Tanzanian e-consumers face have been highlighted,<sup>106</sup> including when the transaction and instruction language is different from the national language or language known to e-consumers, the use of technical language, and the illiteracy factor. The following discussion will highlight available initiatives on language concerns.

#### *EU Directive on Electronic Commerce*<sup>107</sup>

The Directive briefly addresses the language issue under article 10 by requiring service providers to provide information regarding the languages offered for the conclusion of the contract.<sup>108</sup> This provision is unsatisfactory as it does not offer much protection for e-consumers language concerns. A simple knowledge of what language is used will still leave e-consumer helpless.

However, the issue of language has been addressed by the European Commission in its *Communication from the Commission to the Council and the European Parliament Concerning Language Use in The Information of Consumers in the Community* (COM/93/456). It stated that ‘consumers have a right to information on the qualities and characteristics of products and services on the market’<sup>109</sup> and hence the need for ‘the basic information to be readily available to consumers.’<sup>110</sup>

The Communication further stated that the language chosen to disseminate the information is crucial and also emphasised not only in the language that consumers use but also the importance of the actual wording of information given to the effect

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<sup>106</sup> Refer to language discussion at 3.2.1(b)(iii) above.

<sup>107</sup> *Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the internal market ('Directive on Electronic Commerce')* [2000] OJ L 178, p 1.

<sup>108</sup> *Ibid* art 10 (d).

<sup>109</sup> Commission of the European Communities, *Communication from the Commission to the Council and the European Parliament Concerning Language Use in The Information of Consumers in the Community* (COM(93) 456 final, 10 November 1993), para 1,2 <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:51993DC0456>>.

<sup>110</sup> *Ibid*.

that it is understood by the consumer.<sup>111</sup> The emphasis for easily understood, clear and unambiguous language is relevant not only in the labelling of the consumer products but also in 'the manner of use, assembly instructions, precautions regarding employment or use and any warning intended for the final user of the product or service.'<sup>112</sup>

This is important guidance for e-consumer protection which needs to be adopted in Tanzanian initiatives. One practical issue which was raised in the Communication was the cost of translation of products and services offered,<sup>113</sup> and it was agreed that the importance of consumer protection outweighed the costs arising from providing such protection. Similar views can be upheld for Tanzanian initiatives, but further actions may be taken to assist small businesses who may not be able to carry out the requirements of translation or for providing clear information to e-consumers. This may be by way of an e-consumer resource centre where translation is made readily available to e-consumers; or where businesses may be able to offer product information files which can be readily downloaded by e-consumers.

The issue of language concerns in electronic commerce has also been addressed under the Court of Justice of the European Communities in the case of *GB-INNO-BM v Confédération du Commerce Luxembourgeois*,<sup>114</sup> where the court stressed the importance of product labelling and ruled that consumer information was one of the principal requirements of community law in the domain of consumer protection.<sup>115</sup> This case was not dealing with issues of language per se but rather whether a Belgian company, GB-INNO-BM, having business both in Belgium and Luxembourg, should advertise in Luxembourg.<sup>116</sup> However, the ruling is a good foundation for consumer protection on language concerns as it emphasises the importance of appropriate labelling of the products so as to provide consumers with the information they need and enable them to make fully informed choices.<sup>117</sup>

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<sup>111</sup> Ibid para 1-6.

<sup>112</sup> Ibid para 31.

<sup>113</sup> Ibid.

<sup>114</sup> (C-362/88) [1990] ECR I-00667.

<sup>115</sup> Ibid 672.

<sup>116</sup> Ibid.

<sup>117</sup> Ibid.

The importance of the use of language that consumers can understand is also seen in the case of *Piageme v Peeters*,<sup>118</sup> where the defendant was taken to court for not providing products in consumers' language. The plaintiffs, Piageme and others, took the defendant Peeters to court for breach of Belgian legislation regarding labelling of foodstuffs which requires businesses to label foodstuffs in the language of the region where the products are sold. Peeters offered mineral water bottles for sale in Belgium, but they were labelled either in French or German instead of Dutch, the language of the region. Emphasis on the use of language that consumers can understand or ensuring that the consumer is informed by other measures was stressed. It is contended that in practice, 'information is transmitted more precisely when it is provided to the consumer in his own language or languages.'<sup>119</sup> This highlights the need to ensure that language concerns are addressed.

(i) Initiatives at the national level

***Trade Practices Amendment (Australian Consumer Law) Act (No. 2) 2010***

The Act provides for a requirement of a transparent term which needs to be expressed in reasonably plain and legible language.<sup>120</sup> This provision addresses unfair terms and describes conditions which may deem a term unfair. One of these conditions is when the term is not transparent enough. According to the Act, a term is transparent when it has been expressed in reasonably plain language.<sup>121</sup>

The requirement of plain language seems relevant in the Tanzania scenario. However, the section as a whole does not address the raised issue of language directly as already discussed. Whereas the provision is relevant and offers important highlights for Tanzania, it is not sufficient to cover all language uncertainties. This provision, if combined with the requirements discussed under European Union above, will form a strong protection as far as language is concerned.

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<sup>118</sup> (C-369/89) [1991] ECR I-02971.

<sup>119</sup> Commission of the European Communities, above n 109, para 17.

<sup>120</sup> *Trade Practices Amendment (Australian Consumer Law) Act (No. 2) 2010* s 24(3).

<sup>121</sup> *Ibid.*



Hence, Tanzania initiatives should reflect requirements from both jurisdictions and also should reflect the local needs of the e-consumer and address core issues arising in the Tanzanian market. Whereas English and Kiswahili are both recognised and widely used in Tanzania, the official and business language is English. However, there are consumers who may not be very comfortable in using English. In order to safeguard e-consumers' welfare, it is necessary that sellers be required to offer a translation in Kiswahili when needed or asked by the e-consumers.

Moreover, e-consumers are faced with products expressed in languages other than English and Kiswahili, the most popular being the Chinese and Arabic languages; and a presence of foreign and exotic characters. Among the measures that can be taken to assist consumers is to offer a translation service. This may be through encouraging businesses to have readily available translations on their websites or same service can be offered through a consumer protection body. It is essential that such services are free of charge.

The discussion under initiatives from the European Union above revealed the emphasis of labelling products. Whereas this is important, other means should also be considered especially so as to enable small businesses (who may not be able to afford reproducing labels of their own) to offer clear and understandable information to e-consumers. Photographs or diagrams may be used to describe the products offered. The use of such mediums must be delivered in a way that will ensure the meaning is clear to those who cannot read the written language,<sup>122</sup> otherwise they may still not be beneficial 'if advertisements are not designed for consumers with limited reading abilities.'<sup>123</sup> It is also necessary to ensure that the photographs presented to e-consumers are authentic images of what is being sold to e-consumers to avoid misleading or defrauding e-consumers through the medium of communication.

It is also essential to keep in mind the issue of illiteracy when addressing language concerns. This is more so for a country like Tanzania where its literacy rate is 68%

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<sup>122</sup> Haeran Jae, Devon S Delvecchio and Deborah Cowle, 'Picture-Text Incongruity in Print Advertisements among Low- and High-Literacy Consumers' (2008) 42 *Journal of Consumer Affairs* 439.

<sup>123</sup> Ibid 440.

per cent.<sup>124</sup> Addressing illiteracy becomes a matter of necessity when tackling e-consumer issues and e-consumer empowerment and also economy welfare at large. It is argued that information empowers consumers and empowered consumers bring health economy.<sup>125</sup> It is further asserted that:

Competition is driven by empowered consumers, who can make informed choices, and who are prepared to assert their rights and to complain about poor quality goods and services. If consumers choose effectively between different products or services, then they are not putting any pressure on the poorest performing traders to improve. And if people simply put up with poor quality services, then those traders who provide good quality services do not necessarily receive any more customers than those who are substandard.<sup>126</sup>

However, there is a danger for this powerful empowerment tool to be accessed only by middle class consumers, given ‘those who take advantage of information are likely to be the more affluent, well-educated middle-class consumers.’<sup>127</sup> Hence, the need to address illiteracy issues in countries such as Tanzania to ensure that all consumers are empowered and are able to make informed choices. This highlights an important factor that all the suggested measures mentioned earlier will not sufficiently address e-consumer concerns if the targeted e-consumers are illiterate. It can be argued that addressing illiteracy is an integral part of e-consumer protection.<sup>128</sup>

Among measures that can be taken to address illiteracy when safeguarding e-consumer welfare is to incorporate illiteracy measures with language problems. Similar suggestions such as using different mediums like photography may be used when addressing illiteracy issues, and also, through the requirement that information be simplified or tailored to the needs of e-consumers. It is argued that ‘consumers

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<sup>124</sup> The World Bank, *Data: Literacy Rate, Adult Total (% of People Ages 15 and Above)* (30 August 2014) <<http://data.worldbank.org/indicator/SE.ADT.LITR.ZS>>; see also World Vision, *Tanzania* (30 August 2014) <<http://www.worldvision.org/our-impact/country-profiles/tanzania>>.

<sup>125</sup> Geraint Howells, ‘The Potential and Limits of Consumer Empowerment by Information’ (2005) 32 *Journal of Law and Society* 349, 350.

<sup>126</sup> *Ibid* 350 -1.

<sup>127</sup> *Ibid* 357.

<sup>128</sup> It is also recognised that illiteracy issues affect offline consumers and transcends language concerns; however, the discussion here is limited to language concerns facing e-consumers in Tanzania.

have limited ability to understand and process information’<sup>129</sup> and hence the need for ‘plain, intelligible language and easily understood, conspicuous, easily visible, clearly legible, and indelible information.’<sup>130</sup>

### ***Australian Guidelines for Electronic Commerce (March 2006)***

Provisions in the Australian Guidelines for Electronic Commerce require businesses to use clear and simple language to communicate information they offer to consumers on the security of payment methods and the security and authentication mechanisms the business uses.<sup>131</sup> These provision address the need of clear and simple language transaction information offered. This aspect is also necessary to be taken into account when addressing e-consumers in Tanzania. The need for clarity and simple language arises in every aspect of a transaction that e-consumers enter into and must be emphasised in the provisions of any e-consumer initiatives. However, as pointed out, the Tanzania language problem goes beyond that. The provision highlights an important aspect in e-consumer protection, but similar to the subsequent discussed provision; remains unsatisfactory if it stands alone. There is a need to address the language concerns holistically. The need to use a particular medium of communication (e.g. English or Kiswahili), and the need to further assist e-consumers by providing translations must also be addressed.

### ***Canadian Code of Practice for Consumer Protection in Electronic Commerce 2004***

Principle 2 of the Code provides for a language requirement where a vendor offering a good or service on its website must use the same language on the site to: provide all of its material information about the good or service, the vendor, the vendor’s relevant policies, and the terms and conditions of the transaction and all other material information; to conduct online transactions regarding the good or service; and to provide customer service regarding the good or service.

The Code also requires that when the manufacturer’s goods or service information or

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<sup>129</sup> Howells, above n 125, 359.

<sup>130</sup> Ibid 360.

<sup>131</sup> Guidelines 40.2, 42.1.

after-sales support is not available in the language that the vendor initially offered the good or service in, this shall be so stated by the vendor in the language in which the transaction was conducted.

These are useful provisions but they cater for Canadian consumers. They may not necessarily resolve the uncertainties among Tanzanian e-consumers. For instance, as mentioned previously, most of the sellers in Tanzania are not manufacturers and may not be in a position to change information offered on the products. Furthermore, in the Tanzanian environment, it is necessary to encourage sellers to use one of the spoken languages in the country which e-consumers may be more conversant with. Therefore, even where sellers use English in their websites, e-consumers should be assured of availability of the same information in Kiswahili when needed. Hence, such requirements from the provisions are likely to cause uncertainty. This may be rectified by allowing e-consumers to request information in another language available.

However, the provision gives good guidance where it requires that when a product is not available in the language offered by the vendor, it shall be communicated to the consumer. This requirement fosters information availability to e-consumers, making them aware beforehand of any problems. This provision need to be supported by other provisions which offer actual protection to e-consumers as information alone will still render e-consumers helpless.

#### **(d) Insufficient Information**

Among concerns that e-consumers in Tanzania face are a lack of knowledge regarding online transactions they enter into including goods information, information on cancellation rights, return policy, technical support and warranty, actual costs of a transaction and shipping charges.<sup>132</sup>

Similar to other concerns raised in the thesis, these concerns have a local element which reflects the social, economic and cultural situation of the people affected. For instance, the problem of lack of warranty and technical support goes beyond the fact

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<sup>132</sup> For further discussion on this refer to Chapter Three.

that e-consumers are not provided with clear information regarding the warranty; but rather, as the majority of goods are imported; local businesses may not be in a position to readily offer warranty and technical support as the companies responsible are located overseas. Moreover, when such services are offered, it may be costly for e-consumers to pursue them as products may need to be shipped back overseas. Hence a local solution for particular problems is needed.

Similarly, concerns of insufficient information go beyond information offered to e-consumers at one particular time; but rather involve the availability of such information at a future point. E-consumers should be able to review and access information offered throughout and after the conclusion of a transaction.

(i) Initiatives at the regional level

***EU Directive on Electronic Commerce***

Article 5 of the Directive provides for general information to be provided. The article requires member states to ensure that service providers provide additional information to their customers regarding their names, geographic position, details of the service provider such as email, trade register information if applicable, particulars of authorisation scheme if applicable, the relevant supervisory authority, information on the professional body if applicable, VAT identification number and other taxation information if applicable, and clear information on prices, tax and delivery costs.

The article is relevant in addressing concerning issues under the EU community. Moreover, it is directed to service providers under the meaning of EU Directives.<sup>133</sup> However, the article is insufficient in covering uncertainties that arise within Tanzania. It does not address information requirement on products, information on cancellation rights, return policy, technical support and warranty.

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<sup>133</sup> Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the internal market ('Directive on Electronic Commerce') [2000] OJ L 178, p 1, art 2.

Furthermore, even where the Directive addresses some of the information requirements which may be relevant to Tanzania, such provisions will still need to be reworded so as to cover Tanzania situation. For instance, Article 5 requires consumers to be given particulars on price including delivery costs and tax involved. However, this is not sufficient to cover concerns under Tanzania environment. In addition to the above requirements, the price information provided to Tanzania e-consumers need to cover the currency that price is offered, the exchange rate or equivalent price in Tanzania shillings, and the payment will be under local currency or not.<sup>134</sup> It is evident that even though problems facing e-consumers in EU Communities might be similar to some extent to those in Tanzania, there is a need to localise solutions when addressing Tanzania e-consumer concerns given the unique features of the social, economic and cultural influences in Tanzania.

Article 10 of the EU *Directive on Electronic Commerce* requires additional information to be provided such as the steps to be followed to conclude a contract and the technical means to identify and correct input errors. As observed above, these requirements are important to e-consumers in Tanzania, however, they need to be drafted to conform to the actual need of e-consumers in Tanzania. For instance, in a scenario where e-consumers are using public internet facilities, with possibilities of connection interruptions, or intended interference possibly from hackers and fraudsters, e-consumers may benefit from more information on not only how to correct input errors but also on how to complete the transactions in case of connection interruptions; information on steps to complete the transactions and different steps e-consumers may be required to follow will ensure that e-consumers are alert especially when they are directed into different suspicious procedures by hackers and other similar third parties.

It is essential to note here that whereas e-consumers need comprehensive information when transacting online, it is vital to realise the danger of information overload. Discussion on information overload has been carried out under fraud discussion above.

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<sup>134</sup> Please refer to the discussion on Dollarization in Tanzania in Chapter Three.

(ii) Initiatives at the national level

***Trade Practices Amendment (Australian Consumer Law) Act (No. 2) 2010***

Sections 69 – 70 of the Act provides for information that needs to be supplied in case of unsolicited agreements. According to the Act, the unsolicited agreements are agreements that consumers enter into as a result of unsolicited marketing. This is an interesting phenomenon and should be used as guidance when dealing with unsolicited marketing. This provision highlights solutions that may be used to deal with unsolicited emails or spam. Therefore further discussion with regard to this article will be carried out under the spam discussion below. However, it is essential to mention it here as it reflects the importance of information in e-consumer protection. By being informed, e-consumers are empowered. E-consumer information is one of the themes that recurs throughout this study as most of the initiatives available from various jurisdictions emphasise information as a tool for consumer protection. However, as expressed throughout this thesis, providing information to e-consumers is satisfactory but not sufficient.

***Australian Guidelines for Electronic Commerce (March 2006)***

The Guidelines provide for information requirements for consumers.<sup>135</sup> However, these are limited to payment information. It is evident that these requirements are also necessary in safeguarding Tanzanian e-consumers. They need information on available payment methods, security of the available payments, usage of available payment methods, costs and how to cancel such payments.

However, these requirements need to be expanded further especially for the Tanzanian environment. This is due to the complexity of payment services available where third parties with no relation to a transaction are used. These complicate recording, refunds and other payback mechanisms.

It is essential that payment methods be as detailed as possible. Information such as

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<sup>135</sup> Guidelines 40.1 – 40.5.

what are the payments for, date of payments, confirmation of payment receipt and date it was received, name of the sender and receiver and exact amount being paid should be available in retrievable forms for both sellers and e-consumers. Information on the currency is also important as there is a trend of using US dollars (and possibly other foreign currencies) in the Tanzanian market. Information as to the currency used, exchange rates to be used and the final payment currency need to be available to e-consumers before the conclusion of the transaction.<sup>136</sup>

Furthermore, there is a need for e-consumers to be provided with product and other information regarding a transaction such as cancellation rights, return policy, technical support and warranty.

### ***Canadian Code of Practice for Consumer Protection in Electronic Commerce 2004***

The Code of Practice requires consumers be provided with sufficient information to make an informed choice about whether and how to complete a transaction. The Code provides for accessibility of information.<sup>137</sup> This is an important requirement; however, it does not reflect the Tanzanian scenario and should be modified accordingly. In addressing this, the question of what constitutes ‘accessibility’ in Tanzania is important. The social, economic and cultural practises should be kept in mind. In a country where most of the internet use is through public and paid services, where power cuts and rationing are common, accessibility need to be viewed in a broader sense so as to safeguard consumer interests.

Having all information in a website may not be a satisfactory solution.<sup>138</sup> It can even be argued that having conspicuous and easily accessible information links is not enough. The accessibility of information needs to reflect common social and economic practise. This may include a summary of important information that will further be obtained when one follow an appropriate link. This should be made available in every stage (or webpage) of online transaction. It is also essential for the e-consumers to be alerted when this information is changed. E-consumers should also be able to review and retrieve such information for storage purposes.

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<sup>136</sup> It is best for the local currency to be used within the Tanzanian market instead of incorporating foreign currency in transaction payments as this creates different legal issues and uncertainties.

<sup>137</sup> Principle 1.1.

<sup>138</sup> See discussion of information overload above.



The Code<sup>139</sup> further provides that vendors shall identify themselves on their website and provide information about their policies, including to whom consumers should direct claims, ask questions, register complaints or obtain warranty information, repair services and support related to the goods or services available through the site. This provision is similar to others discussed above which requires certain information from sellers to be available. This provision may be adopted with Tanzanian e-consumers in mind. Slight modification on the provision is necessary so as to reflect local characteristics and needs.

A notable provision of this Code that needs to be taken into consideration is under principle 1.4 which requires vendors to make information available about the goods or services for sale in order for consumers to see it before initiating transactions. According to the principle, the information has to include a fair and accurate description of the goods or services offered for sale, including the terms of any service contracts and material information that consumers would otherwise have available to them when buying the goods or services offline and any guarantees and warranties concerning the goods or services. This principle will bring a valuable contribution to the Tanzanian e-market. It is important that e-consumers are well informed of the state of goods and services they buy.<sup>140</sup> As most of the products are imported, it is essential that extra information, which may seem trivial but very useful to e-consumers, be added. For instance, detailed information in transactions of imported electric goods such as voltage requirements and type of socket pins used can save e-consumers from ending up with items they may not be able to use, or have to modify. Also, in instances where items being sold require other items or parts in order to operate, communicating such information to buyers is crucial. The functionality, adoptability and sustainability of goods or services offered need to be made clear to e-consumers.

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<sup>139</sup> Principle 1.3.

<sup>140</sup> (C-362/88) [1990] ECR I-00667; (C-120/78) [1979] ECR I-00649 (*Cassis de Dijon Case*).

## 6.2 INITIATIVES ADDRESSING PROBLEMS DURING PERFORMANCE OF ELECTRONIC CONSUMER TRANSACTIONS

### 6.2.1 *Business to consumer (B2C) online transactions*

#### (a) **Non-delivery and Late Delivery**

Non-delivery and late delivery problems in Tanzania are also characterised with economic, social and cultural factors. The poor transport and delivery infrastructure, unregulated private delivery systems, lack of accountability system to ensure timely dispatch, postal security, an absence of physical address usage and door-to-door delivery are among the factors accountable for late and non-delivery issues.<sup>141</sup>

##### (i) Initiatives at the global level

There are few initiatives found in regulating non-delivery and late delivery of goods in e-consumer transactions. This is more so under global and regional levels where all identified international instruments such as the *UNCITRAL Model Law on Electronic Commerce*,<sup>142</sup> *OECD Guidelines for Consumer Protection in the Context of Electronic Commerce 1999*, *EU Directive on Electronic Commerce* and the *United Nations Convention on the Use of Electronic Communications in International Contracts*<sup>143</sup> do not address the issue of non-delivery and late delivery.

It is essential to note that one potential measure which may be used for consumers is the *Sale of Goods Act, 1931*.<sup>144</sup> However, it is doubtful that this will be satisfactory in addressing e-consumer concerns in Tanzania. The Tanzania *Sale of Goods Act* was enacted without considering online concerns as it was enacted long before the

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<sup>141</sup> Refer to Chapter 3.31(b)(i) for discussion on non-delivery and late delivery.

<sup>142</sup> GA Res 51/162, 51<sup>st</sup> sess, Agenda Item 148, UN Doc A/RES/51/162 (30 January 1997, adopted 12 June 1996).

<sup>143</sup> Opened for signature 23 November 2005, UN Doc A/60/515 (entered into force 1 March 2013).

<sup>144</sup> [18 of 1931, Cap 214 R.E. 2000].

development of e-commerce; online issues were not foreseen and therefore not addressed. An instance of these circumstances is partial sale and delivery,<sup>145</sup> or non-delivery of online goods in electronic forms. Furthermore, the *Sale of Goods Act* excludes cross border consumer transactions, and hence e-consumers cannot rely on the Act in this matter.

Some initiatives at the national level have addressed the issue of non-delivery and late delivery in general consumer protection and e-consumer transactions. Discussion on these initiatives and how they can be relevant for Tanzania is discussed below.

(ii) Initiatives at the regional level

***Directive on Consumer Rights***<sup>146</sup>

The *Directive on Consumer Rights* is a new Directive effective from June 2014. This Directive repeals the *Directive on Distance Contracts*<sup>147</sup> and the *Directive on Contracts Negotiated Away From Business Premises*<sup>148</sup> and amends the *Directive on Certain Aspects of the Sale of Consumer Goods and Associated Guarantees*<sup>149</sup> and *Directive on Unfair Terms in Consumer Contracts*.<sup>150</sup>

The *Directive on Consumer Rights* addresses issues of delivery where it provides a time limitation of 30 days unless the parties have agreed otherwise. After the duration of 30 days the consumer may contact the seller and request delivery upon addition period of time appropriate to the circumstances. If the trader fails to deliver the goods

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<sup>145</sup> Partial Sale and delivery is discussed on a subsequent section below.

<sup>146</sup> Directive 2011/83/EU, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council ('Directive on Consumer Rights') [2011] OJL 304/64.

<sup>147</sup> Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts ('Directive on Distance Contracts') [1997] OJ L 144, p 19.

<sup>148</sup> Directive 85/577/EEC of the European Parliament and of the Council 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises [1985] OJ L 372, p 31.

<sup>149</sup> Directive 1999/44/EEC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees [1999] OJ L 171, p 12.

<sup>150</sup> Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L 095, p 29.

within that additional period of time, the consumer shall be entitled to terminate the contract.<sup>151</sup>

The exception of giving additional period of time would be where delivery within the agreed delivery period is essential taking into account all the circumstances surrounding the conclusion of the contract or where the consumer informs the trader, prior to the conclusion of the contract, that delivery by or on a specified date is essential.

These provisions are essential in dealing with delivery issues. Moreover, the provisions seem to cater for the welfare of SMEs by requiring consumers to give businesses additional time when they fail to deliver the goods after the initial time. However, several questions arise when dealing with the provisions and if not answered correctly, the provisions are likely to cause uncertainties for consumers. Among the questions which need to be answered are, how long should the ‘additional period of time’ be, and what is considered ‘appropriate to the circumstances’? Moreover, the phenomenon ‘essential agreed delivery period’ needs to be clarified to avoid confusion.

It is also essential to establish what constitutes a reasonable time for shipping of consumer goods. Whereas 30 days may be reasonable between EU states, the same might not be true for Tanzania where one or two weeks may be adequate shipping time for local purchases; and more time may be required for cross border transactions. For instance, buying cars from Japan<sup>152</sup> requires longer delivery times than buying other small products from Japan; the former can be sent via sea transport whereas the latter are mostly transported by air. All of these need to be reflected in the legal measures taken. Hence, realistic and practical shipping periods which reflect Tanzania situation should be considered when answering uncertainties surrounding delivery. Among the challenges that are noted here is the regulation and law implementation of international and cross border transactions. This challenge may be faced by addressing means of cooperating with other cross border jurisdictions in e-commerce

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<sup>151</sup> *Directive on Consumer Rights* [2011] OJL 304/64, art 18.

<sup>152</sup> Motor vehicles and other machinery from Japan are commonly purchased by e-consumers in Tanzania, see Chapter Three.

and e-consumer protection. It is also important to set legal guidance that needs to be followed in an international transaction.

Furthermore, the provision states that these conditions will not apply where parties have agreed otherwise. Whereas, this provision seems to bring flexibility among the parties, at the same time it place consumers in a vulnerable situation where they may be susceptible to unfair terms and dealings. As the Directive is yet to be implemented, these questions, together with the provisions, have not been put to the test. However, it is evident that the wording of the provisions leaves gaps which are likely to disadvantage consumers as they have less bargaining power.

One aspect of the Directive is that it recognises and addresses the delivery of digital content. According to the Directive, digital content means ‘data which are produced and supplied in digital form.’<sup>153</sup> This includes computer programs, applications, games, music, videos or texts.<sup>154</sup> The Directive excludes the right to withdraw from a contract where the contract involves digital goods. However, the Directive does not address any concerns arising in the delivery of digital contents.

### (iii) Initiatives at the national level

#### ***Trade Practices Amendment (Australian Consumer Law) Act (No. 2) 2010 (Cth)***

The Act sets a requirement that gifts, rebates, prices and such offers must be delivered.<sup>155</sup> The provision further requires that such rebates, gift, prizes or other items be delivered within the time specified in the offer, which must be a reasonable time after making the offer.<sup>156</sup> This provision is useful as it imposes an obligation of delivery by the seller. However, the provision is in relation to any rebate, gift, prize or other free item offered in connection with the promotion of supply of goods or services. Hence it was not meant to regulate non-delivery and late delivery issues; however, it is essential as it addresses e-consumer concerns which need to be

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<sup>153</sup> *Directive on Consumer Rights* [2011] OJL 304/64, art 2(11).

<sup>154</sup> *Ibid* Recital 19.

<sup>155</sup> *Trade Practices Amendment (Australian Consumer Law) Act (No. 2) 2010 (Cth)* s 32.

<sup>156</sup> *Ibid*.

addressed. There is a need to adopt provisions that ensure that all commercial enticements such as gifts and other free items offered are delivered to e-consumers. As a general rule, this should be free of charge although normal charges may apply when necessary and where it has been communicated to the consumers beforehand.<sup>157</sup>

### ***Australian Guidelines for Electronic Commerce (March 2006)***

Guideline 32.5 provides a requirement for terms of delivery information to be provided to buyers. Whereas this is an important provision, it is too general to solve the non-delivery or late delivery uncertainties. The wording is general in that it allows seller discretion to determine what includes terms of delivery. This may not necessarily include time of delivery which is favourable to e-consumers and does not address the issue of non-delivery. There is a need for more specific and detailed provisions to address the raised concerns. There is a need to have a provision that will require sellers to give e-consumers an estimated delivery time of the goods, and allow e-consumers to have delivery time span that caters to their need. An example of a way in which this can be addressed is seen in the provisions of the *Directive on Consumer Rights*,<sup>158</sup> discussed above where consumers can inform the business, before a conclusion of a transaction, that delivery by or on a specified date is essential.

### ***Canadian Code of Practice for Consumer Protection in Electronic Commerce 2004***

Similar to the *Australian Guidelines for Electronic Commerce*, principles under this Code provides for requirements of delivery information. However, the Code gives more direct requirements on what should be offered to consumers. Principle 1.5 (h) provides for requirement of information on the time frame for shipping goods or activating service, how consumers will be notified when the vendor is unable to complete the order or service request within this time frame, and options for delivery. Despite being more detailed, it only instigates for information to be offered to e-consumers; and like the provisions from the Australian Guidelines, does not facilitate for e-consumers' negotiation on the delivery dates. The provisions also do not address other concerns such as late delivery, partial delivery and digital delivery. Delivery

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<sup>157</sup> Refer to the subsequent discussion on insufficient information.

<sup>158</sup> [2011] OJL 304/64, art 18 (2).

information alone will not protect e-consumers from devious trade practices such as providing longer delivery periods as a means of inducing e-consumers to pay more for fast delivery.<sup>159</sup> There is a need for further e-consumer protection to ensure that the delivery time truly reflects the reality of shipping such goods.

Principle 3.2 provides that when an order cannot be fulfilled within the time frame originally specified, vendors shall promptly notify consumers, and provide them with the option of cancelling the order at no charge, except when doing so would be unreasonable. This is also an important provision and will benefit Tanzania e-consumers as they need to be informed whenever an order cannot be fulfilled within the originally specified time frame. However, it needs to be applied with caution as this provision may act as a good excuse for avoiding vendor obligations due to inefficient delivery service, lack of stock for delivery, or when the seller wants out of the transaction. Moreover, it is not clear what will constitute unreasonable conditions. Therefore, the provision needs to be further qualified, for example, by requiring vendors to inform e-consumers the reasons for delay, the new time frame, and give the e-consumer the opportunity to respond to such actions, such as the option to cancel the transaction if a delay is detrimental to them.

Principle 3.4 (d) provides that vendors shall not hold consumers liable for any charges related to a transaction where the good or service was not delivered in the time specified, or under the conditions stated in the original offer. This provision provides much protection to e-consumers, however, there is a danger of creating market disorder if adopted as it is and applied to Tanzania scenario without taking in account the factors surrounding delivery issues in Tanzania.

Discussion in chapter three has pointed out these factors which include a lack of efficient postal infrastructure and a generally poor infrastructure, postal security, absence of physical address usage and door-to-door delivery among other things. There is also a presence of private delivery services which are not sufficiently regulated and operate very much on their own terms. The system is growing and improving slowly. Consequently, a lot of uncertainties arise when it comes to

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<sup>159</sup> See discussion on this in Chapter Three.

allocating loss and responsibilities in non-delivery and late delivery of goods. There is a danger of e-market distortion if responsibility for these uncertainties is given to one stakeholder over the other without first clearly defining the obligations of all stakeholders involved. Furthermore, such measures may be detrimental to e-consumers especially where they play a role of the e-consumer seller.

Therefore, this provision will not be as effective and yield the intended results if applied as it is to Tanzania initiatives. There is a need of allocating risks and responsibilities to the appropriate parties.<sup>160</sup> Also, appropriate consequences need to be taken in accordance with every situation. For instance, in cases where the seller is aware of a delivery delay; or is responsible for the delay, and has not yet notified the e-consumer regarding the delay, then the e-consumer should be given the opportunity to cancel if accepting such goods will be unreasonable or detrimental to them. However, this should not be the case where the seller is not responsible for delivery delay.

It is also important that e-consumers be supplied with documents showing proof of sending and delivery dates.

### ***Electronic Communications and Transactions Act 2002 (South Africa)***

According to the Act, consumers need to be provided with information regarding the time within which the goods will be dispatched or delivered, or within which the services will be rendered.<sup>161</sup> This is an essential information requirement which Tanzanian e-consumers need to be provided with. However, this requirement alone, as pointed in subsequent discussions on similar provisions above, is not sufficient and does not directly address raised concerns facing Tanzanians e-consumers. As pointed out before, information alone does not sufficiently address non-delivery or late delivery concerns. Therefore, this provision may also be used as a guide, where the importance of delivery information should be taken into account for Tanzania e-consumer protection measures. However, further measures addressing non-delivery and late delivery need to be adopted.

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<sup>160</sup> For further discussion on risk allocation, refer to the following discussion below.

<sup>161</sup> *Electronic Communications and Transactions Act 2002 (South Africa)* s 43.1.(1) .



The Act also provides for performance of sale where the supplier is required to execute the order within 30 days after the agreement; the Act states ‘the supplier must execute the order within 30 days after the day on which the supplier received the order, unless the parties have agreed otherwise.’<sup>162</sup> This provision is similar to Article 18 of the *Directive on Consumer Rights* discussed above. Similar to the Directive provision is the fact that it gives a statutory condition of time within which suppliers are required to dispatch the goods. However, the wordings of the provisions are different in a way that is likely to cause uncertainty where there is no further guidance. One as such is the use of the word ‘execute’.<sup>163</sup> It is not certain at what point in time the order is considered to be executed. Whether it the time when it is dispatched or when it is delivered? It is evident that this provision is important, and may be adopted for Tanzania e-consumer measures. However, it needs to be presented with more clarity and reflect the Tanzania situation.

The provision of the *Electronic Communications and Transactions Act*<sup>164</sup> further provides that where a supplier has failed to execute the order within 30 days or within the agreed period, the consumer may cancel the agreement with seven days’ written notice. The concept within this provision is useful and may be intended to protect consumers; however, it may not always work for their benefit. Principle 3.2 of the *Canadian Code of Practice for Consumer Protection in Electronic Commerce* providing that consumers may cancel a transaction except where by doing so would be unreasonable may be referred here to shed a light. There is a need to recognise that there may be circumstances where a simple cancellation may be detrimental to e-consumer. Moreover, the limitation of a written notice within seven days may also not be favourable for Tanzania e-consumers. It is important to facilitate flexibility and allow more options for e-consumers with regard to their transactions. This is not candidly expressed in the provision. It is essential that e-consumers are able to cancel the order if they desire to do so, however, they should not be required to give a written notice to sellers. Rather sufficient notice may be given to the seller through any mode of communication that have been decided and have been used by the parties in their

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<sup>162</sup> Ibid s 46.1

<sup>163</sup> Ibid.

<sup>164</sup> Ibid s 46 (2).

transaction. Furthermore, it is essential to encourage sellers to respond to such notice as they may have reasonable justifications for the situation.<sup>165</sup>

The Act further provides that if a supplier is unable to meet the terms of the agreement on the grounds that the goods or services ordered are unavailable, the supplier must immediately notify the consumer of this fact and refund any payments within 30 days after the date of such notification.<sup>166</sup>

This provision is important as it sheds light on the measures to be taken in case of failure of performance by the supplier. However, its strict approach may not have a positive effect in Tanzania where most of the local sellers are small business sellers who may have little control of supply of goods from the manufacturer. More flexibility is needed when dealing with growing economic conditions such as those in Tanzania. Moreover, the same provision may be detrimental to e-consumers in Tanzania where goods may be available through limited suppliers. Therefore, sellers should be required to notify e-consumers in cases they cannot supply goods bought within an agreed time on the grounds that the goods or services ordered are unavailable; and e-consumers should have the opportunity to either cancel or continue with the transactions. E-consumers should be given clear information on the time of availability and delivery of such goods.

It is important that local facts and contexts are considered when addressing non-delivery and late delivery issues facing e-consumers in Tanzania. The issue of non-delivery needs to be considered from a wide approach. Different measures need to be in place in case of non-delivery due to loss, fraud, or performance failure. Most of the abovementioned provisions have addressed non-delivery due to performance failure. As pointed out, most of these provisions may be adopted with modifications to fit the Tanzanian situation. Whereas legal measures should encourage sellers to advise buyers on delivery time, the measures should also ensure that the time given is genuine and reasonable and is not used to entice buyers to pay more for faster delivery. For instance, it need not take a whole month to deliver goods to buyers who are in the

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<sup>165</sup> For example, when the buyer failed to see the seller's late delivery notice, or when there is unforeseen situations such as a natural or other disaster which the seller is unaware of. Again, this is a scenario where every case is judged on its own circumstances.

<sup>166</sup> *Electronic Communications and Transactions Act 2002* (South Africa) s 46 (3).

same town or place as the seller while the same goods can be delivered in two weeks to buyers who pay more for delivery. It is noted here that pricing differences may arise due to means of transportation and other justifiable factors; however, the practise of pricing on the basis of time of delivery alone should be discouraged.

Non-delivery due to fraud has been discussed; however, non-delivery due to loss is not widely covered.<sup>167</sup> Addressing this issue in Tanzania is more complicated due to the infrastructure and local practise of using third party delivery mechanisms.<sup>168</sup> There is a lack of local initiatives addressing these issues in Tanzania.

A general consumer protection initiative from India provides valuable input to this discussion. The *Consumer Protection Act* (India) provides for provisions which may enable consumers to seek remedy in case of late delivery or non-delivery of their goods. According to section 2 of the Act, consumers can lodge a complaint when they are faced with a deficiency in service. This seems to be an extension of protection from deficiency goods, where consumers are also protected from deficient services. According to the Act, deficiency in service means:

any fault, imperfection, shortcoming or inadequacy in the quality, nature and manner of performance which is required to be maintained by or under any law for the time being in force or has been undertaken to be performed by a person in pursuance of a contract or otherwise in relation to any service.<sup>169</sup>

This provision seems to offer wider protection than the warranty requirement or the obligation for businesses to render due care and skill when conducting business or service. The implementation of the provision can be seen in the case of *Geeta Rani (Deceased by her husband) Shri Haribabu and others v M/s Air Freight Ltd*<sup>170</sup> where a freight company was held liable for late delivery of a parcel. M/s Air Freight Ltd were paid to deliver a parcel containing a medical sample of a patient from India to be delivered to the US for medical examination. The freight company delivered the

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<sup>167</sup> This discussion has shown that non-delivery due to loss is not addressed by the selected legal instruments.

<sup>168</sup> Refer to Chapter Three at the discussion on problems on non and late delivery.

<sup>169</sup> *Consumer Protection Act 1986* (India) s 2(1)(g).

<sup>170</sup> (1992) CPJ 214 NC.

parcel so late that the medical sample was rendered unusable. The sample arrived in the US in July 1990 but was delivered two months later in September 1990. It was held that there were no plausible reasons given for the delay and the freight company's actions portrayed a deficiency in service; the complainant had to be compensated.

Similarly, in the case of *M/s Skypack Couriers Pvt Ltd v Ms Anupama Bagla I*,<sup>171</sup> a courier was entrusted with a cassette containing a college application. The package was not delivered and the complainant lost her chance to apply for the college. It was held that the neglect and failure within the element in the courier to deliver the article entrusted to them for carriage constituted to a deficiency of service. The complainant was entitled to compensation for damages suffered. The same was held in the case of *Skypack Couriers Private Ltd v CERS I*<sup>172</sup> when the freight company failed to deliver a package containing a passport, visa and air tickets.

An interesting aspect on a judgement is seen in the case of *M/s Airpak Couriers (India) Pvt Ltd v S Suresh*<sup>173</sup> where a consignment of important papers was not delivered by the courier and the complainant was awarded compensation due to deficiency in service. However, on appeal, it was held that the complainant should have insured the papers due to their importance. Hence, liability of the courier was limited to the terms and conditions of the agreement. It is necessary to point out that this view will be detrimental if applied to Tanzania e-consumers and even general consumers at large due to the reality of insurance usage and insuring of shipped items. It can be argued here that insuring of goods bought online is not a realistic option for Tanzania e-consumers due to economic reasons and insurance availability and accessibility.<sup>174</sup> It has been revealed that insurance industry is still growing in Tanzania and a large proportion of the population is untapped.<sup>175</sup> For example, it is argued that insurance in an important area such as health 'struggles to reach the most vulnerable and insecure

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<sup>171</sup> (1992) CPJ 84 NC.

<sup>172</sup> (1992) CPJ 316 NC.

<sup>173</sup> (1993) CTJ 304.

<sup>174</sup> Marketresearch.com, *The Insurance Industry in Tanzania : Key Trends and Opportunities to 2018 Report* (23 July 2014) <<http://www.marketresearch.com/Timetric-v3917/Insurance-Tanzania-Key-Trends-Opportunities-8317598/#toc>>.

<sup>175</sup> Ibid.

in society i.e. the 90% of citizens who work in the informal economy.’<sup>176</sup>

These initiatives may provide one of the solutions for delivery problems, however, they will not offer satisfactory protection to e-consumers, or even general consumers. These initiatives from the Indian Act and case laws still do not address issues of non-delivery in digital or online transactions. There may be circumstances in online transactions where a non-delivery action cannot be associated with a deficiency in service but rather third party interference such as in the case of computer virus invasion or technology failure. Such circumstances may require rectifying actions rather than an allocation of responsibilities and compensation. A good example is the scenario where e-consumers fail to download a digital product from the seller’s website due to technical problems or specifications. A remedy needed may be for an allowance of another download or cancellation of the transaction.

It is also noted from the Indian initiatives discussed that they are limited to deficiency in service which is also likely to be offered by a third party in e-consumer transactions, that is, the courier and not the business which has entered into a transaction of goods with the consumer. The possible available remedies for e-consumers here would be to pursue the matter through contract or private law. Moreover, this raises questions as to the transfer of risks and liabilities of goods and when the buyer becomes the owner of the goods bought.

According to the *UN Convention on Contracts for the International Sale of Goods* (CISG; the Vienna Convention) ‘the risk passes to the buyer when he takes over the goods or, from the time when the goods are placed at his disposal.’<sup>177</sup> In cases where the buyer is bound to take over the goods at a place other than the place of business of the seller, ‘the risk passes when delivery is due and the buyer is aware of the fact that the goods are placed at his disposal at that place.’<sup>178</sup> The exception of this is where the

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<sup>176</sup> Anna Marriott, *Does Health Insurance Work In Tanzania?* (6 October 2011) Global Health Check <<http://www.globalhealthcheck.org/?p=388>>.

<sup>177</sup> Opened for signature 11 April 1980, 1489 UNTS 3 (entered into force 1 January 1988) art 69.

<sup>178</sup> CISG does not regulate consumer transactions and auctions (article 2(a)(b)); however, lack of international initiatives addressing the issue and the important guidance that can be derived from the provisions of the Vienna Convention have necessitated further discussion on the Convention. Understanding the guiding principle governing risk of loss will assist in deliberating measures for e-consumers.

buyer has contracted a carrier and where goods are sold in transit.<sup>179</sup>

The implementation of this provision can be seen in the case of the Mobile grain dryer case<sup>180</sup> where a mobile grain dryer was dropped by a German buyer's personnel after it was delivered by a Danish seller's employee. The dryer was delivered by truck to a few kilometres before the final destination and the buyer's personnel were transporting it to the field using their own tractor and chain. After driving a short distance the chain holding the dryer broke, causing damage rendering the dryer unsuitable for its intended use. The buyer refused to pay and the seller brought a suit against the buyer. In light of article 69 of the CISG, the court held that that delivery of the dryer took place when the buyer took possession by unloading the dryer from the truck by the buyer's personnel. Hence the risk was transferred then.

With this view, the above provisions from the Indian *Consumer Protection Act 1986* will only be useful to consumers if they can be applied directly to the seller. This is likely to cause uncertainty in transactions of goods and create an additional burden to sellers. The sellers' duty is over the quality of goods they are offering and not the shipping service, unless they are shipping through their own private means. However, it is essential to allocate risk of loss. Therefore, a different provision offering similar protection to e-consumers should be considered. The position offered through CISG offers a positive highlight to the matter. However, this provision will not benefit Tanzanian e-consumers as the offline provisions available regarding risk of loss in Tanzania do not share the same view as that of the CISG.

According to the Tanzanian *Sale of Goods Act, 1931*, 'unless otherwise agreed, the goods remain at the seller's risk until the property in the goods is transferred to the buyer, but when the property in the goods is transferred to the buyer, the goods are at the buyer's risk whether delivery has been made or not.'<sup>181</sup> Hence, the risk transfers with the property before delivery and any loss or damage prima facie falls on the

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<sup>179</sup> *UN Convention on Contracts for the International Sale of Goods* art 67, 68; see also Michael Bridge, *The Transfer of Risk under the UN Sales Convention 1980 (CISG)* (2008) <<http://www.cisg.law.pace.edu/cisg/biblio/bridge4.html#v>>.

<sup>180</sup> *CISG Case Presentation (Mobile grain dryer case)*, Randers County Court, 8 July 2004 (Denmark) Case law on UNCITRAL texts [A/CN.9/SER.C/ABSTRACTS/100], CLOUT abstract no 995 (2004) <<http://cisgw3.law.pace.edu/cases/040708d1.html>>.

<sup>181</sup> [18 of 1931, Cap 214 R.E. 2000] s 22.

buyer. This affords consumers little protection as the risk of loss transfers to them even before they have received the products. This will have more of a detrimental effect in online transactions where the buyer has not physically seen the products before and delivery is very much controlled by the seller.

The Act further provides that ‘where the seller is required to send goods to buyer, delivery of the goods to carrier, whether named by the buyer or not is deemed to be delivery of goods to the buyer.’<sup>182</sup> This provision is likely to cause uncertainty when applied to e-consumers’ online transactions; especially where such transactions are cross border. If these offline provisions were to be applied online, it is more likely that e-consumer transactions will fall under the second provision; section 34 of the *Sale of Goods Act*, as the majority of these transactions require shipment by carrier. This will only bring more uncertainties to delivery issues.

A similar situation is revealed under section 2-509 of the US *Uniform Commercial Code* (UCC) where it provides for risk of loss in different types of delivery.<sup>183</sup> According to the Code, there is a shipment contract where risk of loss transfers when goods are delivered to the carrier, and a delivery contract where risk of loss is transferred when goods are delivered to the buyer.<sup>184</sup> In cases where goods are delivered to a buyer without use of a carrier or a bailee, risk of loss depends on the seller’s status as a merchant. Where the seller is a merchant the risk of loss passes when the buyer receives the goods, and in cases where the seller is a non-merchant, risk of loss passes when sellers ‘confirm that goods available to the buyer, and give a reasonable notice for the buyer to take delivery.’<sup>185</sup> It is argued that according to these provisions, e-consumer online transactions fall within the contract of shipment.<sup>186</sup>

It is further argued that the UCC provisions were designed with the assumption that ‘non-merchants rarely become involved in transactions involving carriers.’<sup>187</sup> The

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<sup>182</sup> Ibid s 34.

<sup>183</sup> Seth Gardenswartz, ‘The Risk of Loss in Electronic Transactions: Vintage Law for 21st Century Consumers’ (2001) 6 *Virginia Journal of Law And Technology* 15, 15-18; Francis J Mootz III, David Frisch and Peter A Alces, *Commercial Contracting: Sales, Leases, and Computer Information* (LexisNexis, 2<sup>nd</sup> ed, 2008) 264 -7.

<sup>184</sup> Gardenswartz, above n 183; Mootz III, Frisch and Alces, above n 183, 264-8.

<sup>185</sup> Gardenswartz, above n 183; Mootz III, Frisch and Alces, above n 183.

<sup>186</sup> Gardenswartz, above n 183, 17; Mootz III, Frisch and Alces, above n 183, 266.

<sup>187</sup> Mootz III, Frisch and Alces, above n 183, 267.

drafters of the code did not contemplate the rise of the internet and the effect it would have on consumers who transact online.

Consequently, the Code allocates the risk of loss to buyers based on how they receive their goods rather than using the UCC's underlying theory of putting the risk on the party in physical control, or who is most likely to insure the goods.<sup>188</sup> As a result, consumers, especially those who transact electronically are faced with uncertainties and little protection. As pointed out in previous paragraphs, e-consumers in Tanzania are likely to face similar uncertainties when the available provisions guiding transfer of risk of loss are applied in electronic transactions.

Furthermore, it is essential to consider how e-consumers' delivery concerns may be protected through insurance. The question as to who should be vested with the obligation to insure the transaction needs to be examined. The discussion on UCC provisions revealed that the underlying theory in allocating risk of loss is to protect the party who has less control,<sup>189</sup> no doubt in most cases this is the consumer. It is argued that it is more likely for the business to insure goods than the consumer.

Other goals for risk of loss allocation are 'to bring clarity, conformity to common assumptions, reduction of avoidable losses and encouragement of efficient breaching behaviour.'<sup>190</sup> However, applying these rules to e-transactions does not conform to all of these goals.<sup>191</sup> It would seem parties who are in control of goods are 'in a better position to calculate risk and are able to avoid loss or bear its costs.'<sup>192</sup> Therefore, it can be argued that merchants are in a strong position to insure.<sup>193</sup> The goals for the UCC provisions can be said to sum up the importance of consumer protection everywhere. Needless to say, e-consumers in Tanzania need similar protection, but so too do small businesses, especially those in Tanzania. Therefore, there is a need to strike a balance and ensure that the available measures protect both e-consumers and SMEs; and are also not detrimental to big businesses trading in the country. One way

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<sup>188</sup> Gardenswartz, above n 183, 17.

<sup>189</sup> Ibid 16 -18.

<sup>190</sup> Mootz III, Frisch and Alces, above n 183, 265.

<sup>191</sup> Ibid 266.

<sup>192</sup> Ibid 265.

<sup>193</sup> Ibid 267; Gardenswartz, above n 183, 17.



this may be done is to have a set of clear rules on the passing of risk so that both parties keep transactional costs caused by insurance premiums to a minimum.

This may be addressed by considering the bargaining power of the sellers and e-consumers and socio-economic realities. In the situation where sellers deliver the products through their own delivery means, they should bear the responsibility of safe delivery. However, where public means of delivery are used, or where consumers elect to arrange their own courier services, sellers may not have full control and hence may not be able to bear full responsibility. It is also an expectation that sellers would insure their businesses in the first place, hence, they would be expected to take regard and care in dealing with shipping insurance. Similar care should be taken with regard to using reliable and reasonable shipping services.

Localising of transactions may also be one of the solutions addressing these challenges. Examples here may be drawn from Australia's after-sale support system and manufacturer liability where importers are seen as manufacturers and liability action can be brought against importers in case of loss or damage caused by goods bought.<sup>194</sup> According to the *Australian Consumer Law*, a manufacturer is 'a person who imports goods into Australia if (i) the person is not the manufacturer of the goods; and (ii) at the time of the importation, the manufacturer of the goods does not have a place of business in Australia.'<sup>195</sup> Adopting this for Tanzania may reduce costs, time and uncertainties which surround consumers when manufacturer liability issues arise. A question which needs to be kept in mind when applying this scenario to Tanzania environment is to what extent should importers be liable for goods they have imported. It is essential to recognise limitations that Tanzania importers face.

#### **(b) Partial Sale or Delivery**

Tanzania e-consumers are also faced with the problems of partial sale or delivery. This is complicated further in the online environment where partial downloads, sales and even issues of incompatibility occur, especially where products bought are

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<sup>194</sup> *Trade Practices Amendment (Australian Consumer Law) Act (No. 2) 2010 (Cth)*, Part 3-5.

<sup>195</sup> *Ibid* s 7(e).

delivered online through downloads or emailing. Partial sales and delivery may occur through technical failure or seller's limitation. In Tanzania environment, this is complicated further by e-consumers' surrounding issues such as availability, compatibility and reliability of delivery mediums. Delivery may be partial due to interrupted downloads (such as due to power shortage and interruptions which Tanzania e-consumers faces), lack of other services or facilitating software, lack of technical requirements or being presented with trial and freeware licences.<sup>196</sup>

(i) Initiatives at the global level

Similar to the issue discussed above, little has been addressed on the partial sale or delivery of goods or services. This observation is reflected under initiatives at all jurisdictional levels. There are several provisions addressing delivery issues. These provisions, as pointed in the subsequent discussion above, are general and do not focus on partial or sale delivery problems as presented in this work. Some offer guidance as to what should be done in case there is delayed or late delivery. However, little guidance is given when delivery is partial. One provision worth noting is from the *Australian Guidelines for Electronic Commerce*.

(ii) Initiatives at the national level

***Australian Guidelines for Electronic Commerce (March 2006)***

These Guidelines have a provision that is essential to note in this discussion. Guideline 16 provides that businesses should ensure that electronic delivery of goods or services can be achieved without specialised software or hardware, unless the requirement of such specialised software or hardware is made clear to the consumer beforehand. This is an important provision in addressing instances of partial sale or delivery of electronic goods as it requires buyers to be made aware of a need for specialised software or hardware for receiving the electronic goods bought online.

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<sup>196</sup> Refer further discussion on partial sale and delivery in Chapter Three.

This provision is relevant when trying to address the problem of partial sale or delivery as among the causes of partial sales and delivery is the technical and technological requirements for receiving products bought. However, the provision alone is not sufficient in addressing the problem of partial sale and delivery. Other aspects of the problem need to be addressed. This can be done through addressing how to prevent or minimise partial sale and delivery from occurring, and the measures to be taken when it does occur.

The measures offered through *Australian Guidelines for Electronic Commerce* can be widened to cover aspects of both sale and delivery; where e-consumers may be advised on partial sale or delivery. For instance, where there are any conditions causing a partial download of a software bought, e-consumers should be alerted before committing to purchase and download. This can be done by adding information or a clause by the seller which the buyer will clearly see before committing to buy; or a button which e-consumers will have to click indicating they are about to buy a partial program or indicating the program will not work unless they have certain things.

In instances where partial sale or delivery has occurred,<sup>197</sup> buyers should be given the opportunity to download and re-access. Where possible, buyers should have access to a stored/backup copy of the purchased items to enable them to restore any mechanical failure.

### **(c) Interoperability**

Interoperability is a major problem in electronic transactions, especially in payments and delivery in Tanzania. Interoperability issue is even more prominent in the country due to the integration nature of e-commerce, where mobile phone services are also involved. Consequently, interoperability is needed between these online and mobile services; and also within the services. For instance, mobile phone payment systems, which offer major payment system for e-transactions in Tanzania, are not interoperable with each other. The exception of this is the very recent development of

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<sup>197</sup> Such as when partial sale or delivery is caused by technical failure on the part of the buyer.

three mobile companies, which have joined forces to enhance their competitiveness.<sup>198</sup> Payment is only one of the areas where the issue of interoperability arises. The issue of interoperability need to be addressed in its entirety at the regulatory level, where all aspects affected by interoperability in e-consumer transactions need to be addressed.

The problem of interoperability in e-consumer transactions is not addressed in initiatives discussed in this work both at international and national level. However, there are other areas of law that have dealt with interoperability issues. Even though these do not directly address e-consumer concerns they can be pointed out to highlight what might be the right direction to take when addressing interoperability in e-consumer transactions.

One such area is competition law where the European Court of First Instance (CFI) ruled that Microsoft violated the European Union's competition law by failing to provide its rivals with a proprietary computer protocol that would have enabled them to make their products fully 'interoperable' with Microsoft's dominant operating system.<sup>199</sup>

Even though this ruling does not involve consumer transactions, it is essential to be taken into consideration while trying to find answers on electronic consumers' interoperability issues. The kind of interoperability involving two service providers is surely in a different aspect to that between service providers and consumers. However, the relevance of this ruling is on its substance.

There are different opinions as far as the ruling is concerned.<sup>200</sup> There is the opinion that this approach by Europe has opted for less intellectual property protection and more short-term consumer benefit, as opposed to the US which fully protects

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<sup>198</sup> Katrina Manson, 'Trio Team Up to Challenge Vodafone's M-Pesa Hold in Africa', *The Financial Times* (online), 4 June 2014 <<http://www.ft.com/intl/cms/s/0/2556cb6a-ec04-11e3-a9e3-00144feabdc0.html#axzz39rDHONkE>>; Richard Handford, 'Operators Sign "First" Interoperability Agreement for Mobile Money in Africa', *Mobile World Live* (online), 5 June 2014, <<http://www.mobileworldlive.com/operators-sign-first-interoperability-agreement-mobile-money-africa>>.

<sup>199</sup> Alan J Devlin, Michael S Jacobs and Bruno L. Peixoto, 'Success, Dominance, and Interoperability' (2009) 84 *Indiana Law Journal* 1157.

<sup>200</sup> *Ibid.*

intellectual property more by less sharing obligations; and has chosen to sacrifice some short-term consumer welfare in exchange for preserving to a fuller extent the incentives for innovation and the long term consumer benefits that it promises to bring.<sup>201</sup> However, when dealing with electronic consumer protection in Tanzania it is essential that the approach taken by the CFI be taken into consideration. This is due to the fact that violation of consumers' rights in developing countries such as Tanzania is massive and there is a need to facilitate consumer protection so as to have order and stability and enhance economic growth in society.

The area of interoperability is wide and covers different aspects of the law; it may be impractical to locally regulate some aspects concerning interoperability due to the common approach taken at an international level where the efforts to develop interoperability tend to be left to market players. However, the interest in this work is directed at interoperability issues resulting in violations of e-consumer rights which can be addressed by the law to safeguard consumer interests.

The issue of interoperability was also discussed in the case *Chamberlain Group Inc v Skylink Technologies Inc*<sup>202</sup> Chamberlain manufactured garage door openers with remote units which had a special code system that transmitted a new code every time it was used so as to protect the owners against playback attacks. Skylink was able to figure out the system used and produced a working remote for the garage doors. Chamberlain took Skylink to court for producing the remotes, claiming that their ability to interoperate with Chamberlain's garage door opener violated the controversial *Digital Millennium Copyright Act 1998* (US).<sup>203</sup> The court ruled against Chamberlain as Chamberlain did not tell its customers that they couldn't use competing remotes. The Court was of the view that consumers may use other devices manufactured by different companies as they have a reasonable expectation that they can replace the original product with a competing, universal product without violating federal law.

This was a copyright case that involved an issue of interoperability between two

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<sup>201</sup> Ibid.

<sup>202</sup> *Chamberlain Group Inc v Skylink Technologies Inc*, 381 F 3d 1178 (Fed Cir, 2004).

<sup>203</sup> (DMCA), 17 USC §512 (1998).

companies but is essential guidance when addressing interoperability issues facing e-consumers. The reasoning of the court had consumer interests in mind; it is this interest that is relevant to the situation at hand. It is essential that e-consumers are provided with wider choices when it comes to interoperable products and services. It is essential to ensure that interoperability does not harm the consumer.

Commitment to interoperability issues is also seen in a US *Framework for Protecting Privacy and Promoting Innovation in the Global Digital Economy*<sup>204</sup> where it states that the US will engage with their international partners to create greater interoperability among their respective privacy frameworks. This is so as to provide more consistent protections for consumers and lower compliance burdens for companies. A highlight of this framework is the effort that the US government is putting into consumer protection. It also highlights that interoperability is an essential key in all aspects concerning consumer protection; including several frameworks such as data privacy. It is clear that efforts are still underway in addressing interoperability in different areas. It is essential that this matter be addressed under the Tanzania jurisdiction.

The problem of interoperability can also be addressed by requiring service and product providers to allow their consumers to use services or products bought into other devices where there is a need to do so. An example of this is allowing consumers to be able to transfer products bought into their new devices or into other devices they own.

#### **(d) After Sale Support**

Tanzania e-consumers are faced with uncertainties about after sale support. It is unclear as to what after sale services they may receive especially where it is not clearly expressed. Returns and refund of goods, pursuing warranty and guarantees and receiving technical support may be impossible or very expensive especially where

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<sup>204</sup> The White House, *Consumer Data Privacy in A Networked World: A Framework for Protecting Privacy and Promoting Innovation in the Global Digital Economy* (February 2012) <<http://www.whitehouse.gov/sites/default/files/privacy-final.pdf>>.

goods are imported from manufacturers overseas.<sup>205</sup>

After sale support is an essential ingredient for a satisfactory consumer transaction; without it, consumers may end up with products or services they may not be able to use, among other things. The issue of after sale support has been addressed at a regional level,<sup>206</sup> as pointed out below.

(i) Initiatives at the regional level

***OECD Guidelines for Consumer Protection in the Context of Electronic Commerce 1999***

The *OECD Guidelines for Consumer Protection in the Context of Electronic Commerce* have addressed the issue of after sale support by requiring consumers to be provided with information on after sale services.<sup>207</sup> Paragraphs 5 (vii) – (ix) of Guideline III.C requires information regarding after-sales service be made available: details of, and conditions related to withdrawal, termination, return, exchange, cancellation and/or refund policy information, available warranties and guarantees.

These requirements are important, however, the wording is narrow and general and does not afford full protection to consumers facing after sale support issues. According to the wording used, the seller is only required to do give consumers information regarding after sale support. In order to deal with after sale support problems facing consumers in Tanzania, the issue need to be addressed more extensively. Therefore, the wordings from the guidelines should be adopted as information is relevant to consumers; however, the matter should be addressed further so as to render greater consumer protection. An instance of such address would be requiring a basic after sale support from manufactures and products\and service providers who are capable to offer such. In another instance, seller and service providers may assist consumers in after sale support through connecting them with

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<sup>205</sup> Refer further on after sale support discussion in Chapter Three.

<sup>206</sup> Other regional and global initiatives considered in this work have not addressed the issue of after sale support.

<sup>207</sup> Paragraphs 5 (vii) – (ix) of Guideline III.C

manufacturers, representing their issues to manufacturers and offering direction to consumers needing further information or directions as far as after sale support is concerned.

Apart from the guidelines, there seems to be little which addresses the issues of after-sale support at the regional level.

(ii) Initiatives at the national level

There are efforts taken at a national level in addressing the issue of after sale support.<sup>208</sup>

***Trade Practices Amendment (Australian Consumer Law) Act (No. 2) 2010 (Cth)***

The Act prohibits misleading information concerning facilities for repair or spare parts.<sup>209</sup> This provision is relevant to Tanzania, however, it is not sufficient enough as the wording limits its application to misleading information concerning facilities for repair or spare parts.<sup>210</sup> Nevertheless, the concept presented in the provision is very important as it reflects what e-consumers in Tanzania face regarding after sale support. The provision should be adopted and expanded to cover all possible situations that consumers may face. Therefore, there should be a provision prohibiting misleading information with regard to after sale support. This should include misleading information with regards to repair or spare parts, facilities availability, representatives at certain location, easiness of accessibility and contacts, costs for receiving such support and other issues that consumer face when they try to access after sale support.

A similar provision should be provided which prohibits actual actions instead of just misleading information. For example, prohibiting extra unfair charges for after sale support, such as charges for spare parts where goods are under warranty, extra or

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<sup>208</sup> Not all national initiatives examined in this work have addressed the issue of after sale support.

<sup>209</sup> s 29 (1)(j) .

<sup>210</sup> Please note, whereas this provision is insufficient in addressing the issues discussed, the provision is relevant in Australia as it complements other general consumer protection provisions; combined they afford effective protection to the consumer.



unexplained shipping costs, workmanship during repairs, and so forth. This is essential in Tanzania where the majority of the sellers are in a dealership business or are subsequent sellers, after buying products from overseas; and are trying to maximise their profits.

It is also important to have an enabling provision requiring sellers and service providers to provide e-consumers with after sale support to the best of their abilities, particularly in Tanzania where there is a possibility that the seller is the only person accessible to the buyer. This is due to the local characteristics of e-commerce in Tanzania where sellers are intermediaries and manufacturers or original/first party sellers are inaccessible. It is likely for consumers in Tanzania to only be able to communicate and deal with the immediate seller. Therefore it is essential that sellers either offer after sale support where applicable or assist the buyer to acquire after sale support, as they are in the best position to do so.

A strong reference may be drawn from the *Trade Practices Amendment (Australian Consumer Law) Act (No. 2) 2010* (Cth) regarding importer liability and<sup>211</sup> where importers are seen as manufacturers in cases where the manufacturer of the goods does not have a place of business in Australia.<sup>212</sup> This may be considered where e-consumers can only access immediate sellers or where there are strings of sellers and manufacturers which e-consumers will have to go through for after sale matters. There may be a need to limit such responsibilities of sellers, however, especially when considering situations such as Tanzania where the sellers are also vulnerable.

Therefore, the after sale support provisions for Tanzania consumers need to reflect the local situation and need. The provisions need to be wide enough to include a liability for sellers to assist consumers acquire after sale support; but at the same time ensure that the burden is not too heavy especially for the sellers who are subsequent sellers and may have little power in offering such assistance.

This can easily be accomplished by categorising sellers' after sale support

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<sup>211</sup> Please refer subsequent discussion on *Trade Practices Amendment (Australian Consumer Law) Act (No. 2) 2010* (Cth) under the Non-Delivery and Late Delivery subsection above.

<sup>212</sup> s 7(e).

responsibilities according to the nature of the sellers. An instance of this would be the expectation of direct and/or indirect after sale support from subsequent sellers, but higher expectations from major sellers and dealerships. The key to allocating such responsibilities will be the capability of sellers in offering after sale support.

***Australian Guidelines for Electronic Commerce (March 2006)***

Guidelines 32.10 and 32.11 set out requirements for details of any explicit warranty provisions and after-sales service. The guidelines state that where applicable, the information provided to consumers after a sale should also include details of any explicit warranty provisions and details of any after-sales service.

Whereas, the provisions of these guidelines seem more general than the provisions discussed above as far as information requirements are concerned, they are more limited in the protection they offer due to the wording. The wording ‘where applicable’ does not make the application of the provisions mandatory; and may easily create uncertainty for consumers as to whether they are entitled to such information or not.

Furthermore, similar to the above discussed provisions, the provisions from these guidelines provide for information only. As pointed out above, information alone is not sufficient to address problems that consumers face in after-sale support in the Tanzania scenario. There is a need to offer further support other than information.

This provision can be adopted and incorporated with the other provisions mentioned above, as the requirement of information to consumers is still an essential element of consumer protection in after-sale support issues.

***Canadian Code of Practice for Consumer Protection in Electronic Commerce 2004***

Principle 1.3 of the Code provides for a requirement of information on after-sale support where it states that:

Vendors shall identify themselves on their Web sites and provide information about their policies, including to whom consumers should direct claims, ask

questions, register complaints or obtain warranty information, repair services and support related to the goods or services available through the sites. The information shall be available to consumers before they engage in transactions and shall include:

- e) the vendor's cancellation, return and exchange policies, including any associated charges;
- f) contact information for consumer service and support, including days and hours of operation, when applicable, and any associated charges;
- g) details of the vendor's complaints process.

This provision is essential in protecting consumers against possible violations they may face while dealing with after sale support. The wording is general as they require vendors to inform consumers where to direct claims, ask questions, complain, and obtain warranty information, repair services and other support. This seems to cover a large area of after sale support issues. It also seems to fit more with the Tanzania scenario as some consumers may need to be assisted with information and guidance from sellers as to where they can direct claims, obtain warranties and so forth.

However, similar to other provisions discussed, the requirement is for providing information; which, as pointed in the subsequent discussion above, is not sufficient in addressing after sale support concerns. Even though this provision has gone further and required vendors to provide information on claims, complaints and after sale support to consumers, it does not imply, and hence does not guarantee that every vendor will have claims, complaints and other after sale support mechanisms in place. There is a need to specifically require vendors to offer after sale support to the best of their ability so as to cover the local situation in Tanzania.

It is noted that other local initiatives considered in this work such as initiatives from South Africa, Uganda and Mauritius have not addressed the after sale support issues.

### (e) Personal Information Handling

Technological developments in the online world have placed all e-consumers in a more vulnerable position as far as personal information is concerned. E-consumers need to provide a great deal of personal information which is not needed in offline transactions. In offline transactions, consumers do not have to supply their names, address, email or bank details and so on when they purchase a single product; but this is the case when e-consumers buy products online.

If such information is not handled with care, e-consumers are negatively affected. This is due to the fact that such information may be misused and abused; it may be used for fraud, identity theft, spam, and so on. There is little control over such personal information provided by e-consumers in Tanzania.<sup>213</sup> An important provision to be kept in mind here is from the *Tanzanian Constitution* which provides the right to privacy and personal security.<sup>214</sup> The provision states that every person 'is entitled to respect and protection of his person, the privacy of his own person, his family and of his matrimonial life, and respect and protection of his residence and private communications.'<sup>215</sup> An element of this constitutional protection needs to be incorporated under e-consumer protection initiatives.

There is no working individual identification system, no effective use of street or residential addresses, and a common practice of sharing mailboxes and living in communal and extended family systems. The whole concept of privacy takes on a different meaning in Tanzania. The potential and limits of privacy protection also widen. Personal information and sensitive information also has a different and broader meaning. What may be considered as public data in other parts of the world may not necessarily be public data in Tanzania.<sup>216</sup>

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<sup>213</sup> Please refer to Personal Information Handling discussion in Chapter Three.

<sup>214</sup> *Constitution of the United Republic of Tanzania, 1977* (as amended) [Cap 2 R.E 2002] art 16.

<sup>215</sup> *Ibid.*

<sup>216</sup> Further elaboration is given in the following discussion on OECD Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data below. Please refer to the three last paragraphs of the discussion.

- (i) Initiatives at the global level

***OECD Guidelines for Consumer Protection in the Context of Electronic Commerce 1999***

The OECD Guidelines<sup>217</sup> provide for privacy where it states that B2C e-commerce should be conducted in accordance with the recognised privacy principles set out in the *OECD Guidelines on the Protection of Privacy and Transborder Flow of Personal Data 1980*; and taking into account the *OECD Ministerial Declaration on the Protection of Privacy on Global Networks*,<sup>218</sup> to provide appropriate and effective protection for consumers.

Therefore, instead of carrying specific provisions with regard to personal information handling it has referred to the whole set of guidelines with regard to personal information handling. This makes it essential to revisit the *OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data 1980* and assess how much they address the issue. It is noted that these guidelines, together with the OECD provisions, were developed by and for, developed countries. Therefore, as is the case elsewhere, where these guidelines and other developed world initiatives are discussed, the provisions will highlight how the world handle particular problems and great consideration will be taken to see how these may be adopted or may fit with the Tanzanian environment.

***OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data 1980***<sup>219</sup>

These guidelines were adopted by the OECD member countries as general guidance on the collection and management of data and personal information and transborder flows of personal data. These guidelines were not intended for protection of e-consumers against personal handling. Furthermore, the guidelines did not foresee

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<sup>217</sup> Guideline VIII.

<sup>218</sup> C(98)177 (8<sup>th</sup> October 1998) (*'Digital Economy Policy'*).

<sup>219</sup> These Guidelines are referred under *OECD Guidelines for Consumer Protection in the Context of Electronic Commerce 1999* as referral point for privacy issues. See *OECD Guidelines for Consumer Protection in the Context of Electronic Commerce 1999*, Guideline VII.

issues that e-consumers might one day face or the current advance in technology and its associated problems; and therefore the guidelines alone are not sufficient in addressing e-consumer problems of personal information handling.

Moreover, it is a view of some scholars<sup>220</sup> that these guidelines may not be current enough to cover the present issues arising in personal information handling and privacy. Maya Gadzheva<sup>221</sup> is of the view that there are new areas of individual vulnerability in the current age of privacy that need to be addressed; whereas Ming-Li Wang argues<sup>222</sup> that the leading privacy regimes in the world have managed to induce over-sweeping privacy policies, for they have underestimated the substantial social change brought about by modern information and communication technologies. Furthermore, John Gaudin<sup>223</sup> is of the view that the OECD Guidelines are insufficient and cannot accommodate the extensive changes that have taken place since they were promulgated. He is of the view that technological changes require us to contemplate discarding the Principles in the *OECD's Guidelines on the Protection of Privacy and Transborder Flows of Personal Data* and the data protection framework upon which they were built.

It is noted that these guidelines have been revised by the OECD; however the 'original basic principles of the guidelines remain intact.'<sup>224</sup> A few new concepts have

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<sup>220</sup> Graham Greenleaf, Nigel Waters and Lee Bygrave, 'Strengthening Uniform Privacy Principles: An Analysis of the ALRC's Proposed Principles' (Working Paper No 17, University of New South Wales Faculty of Law Research Series, April 2008) <<http://law.bepress.com/cgi/viewcontent.cgi?article=1092&context=unswwps-flrps08>>; Australian Law Reform Commission, 'Review of Australian Privacy Law' (Discussion Paper Vol 1 No 72, ALRC, September 2007) Part D; John Gaudin, 'The OECD Privacy Principles - Can they Survive Technological Change? - Part II' (1997) 3 *Privacy Law and Policy Reporter* 196 <<http://www.austlii.edu.au/cgi-bin/sinodisp/au/journals/PLPR/1997/17.html?stem=0&synonyms=0&query=john%20gaudin>>; Ann Cavoukian, *A Report to the 22nd International Conference of Data Protection Commissioners (Venice, Italy): Should the OECD Guidelines Apply to Personal Data Online?* (Information and Privacy Commissioner, Ontario, September 2000) <[www.ipc.on.ca/images/resources/up-oecd.pdf](http://www.ipc.on.ca/images/resources/up-oecd.pdf)>; Maya Gadzheva, 'Privacy in the Age of Transparency: The New Vulnerability of the Individual' (2008) 26 *Social Science Computer Review* 60 <<http://propid.ischool.utoronto.ca/wp-content/uploads/2011/05/gadzheva.pdf>>; Ming-Li Wang, 'Information Privacy in a Network Society: Decision Making Amidst Constant Change' (2010) 5 *National Taiwan University Law Review* 127 <<http://www.law.ntu.edu.tw/ntulawreview/articles/5-1/04-Article-Ming-Li%20Wang.pdf>>.

<sup>221</sup> Gadzheva, above n 220.

<sup>222</sup> Wang, above n 220.

<sup>223</sup> Gaudin, above n 220.

<sup>224</sup> Hunton & Williams LLP, 'OECD Issues Updated Privacy Guidelines' on *Privacy and Information Security Law Blog* (16 September 2013) <<https://www.huntonprivacyblog.com/2013/09/articles/oecd->

been introduced to address some issues such ‘as the need to enhance privacy protection on a global level through improved interoperability, strengthening privacy enforcement and modernize the OECD’s approach to international data flows.’<sup>225</sup>

However, it is likely that some provisions of general data protection and privacy are relevant to e-consumer issues, and new principles addressing the current situation can be built upon existing mechanisms. These provisions and their relevancy in the current situation will be discussed below.

It is noted that wording in the scope of the guidelines; stating that the guidelines apply to personal data, whether in the public or private sectors – which, because of the manner in which they are processed, or because of their nature or the context in which they are used – pose a danger to privacy and individual liberties,<sup>226</sup> may be problematic if applied in Tanzania. Not least because the wording ‘pose a danger to privacy and individual liberties’ can easily be construed to limit the application of the guidelines to a situation where individuals are endangered by such actions. This may exclude the personal information handling in e-commerce where privacy may still be breached without posing a danger to personal liberties. Moreover, the wording ‘whether in public or private sector’ may be used against individuals who in one way or another deals with information. Whether this is the intention of the provisions or not; such a condition will be detrimental to fostering e-commerce in Tanzania. The application of this provision may not be realistic in the C2C world, for instance. A lot of individuals engaging in C2C e-commerce may find themselves in trouble as the nature of the transactions require them to deal with a lot of information; but yet the fact remains that they have little control and power as personal individuals. There is a need for a realistic approach which the pointed provision does not offer.

Moreover, the definition of ‘data controller’ given in the guidelines does not cover all aspects arising from personal information handling problems. The guidelines define ‘data controller’ to mean a party who, according to domestic law, is competent to

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issues-updated-privacy-guidelines/>. See also OECD, *OECD Work on Privacy* (22 April 2014) <<http://www.oecd.org/sti/ieconomy/privacy.htm>> accessed on 22/4/2014.

<sup>225</sup> Hunton & Williams LP, above n 224; OECD, above n 224.

<sup>226</sup> *OECD Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data 1980*, Scope of the Guidelines.

decide about the contents and use of personal data regardless of whether or not such data are collected, stored, processed or disseminated by that party or by an agent on its behalf.<sup>227</sup> This definition is likely to cause uncertainties when applied to Tanzanian e-consumer problems, as e-sellers are not necessarily required under domestic law to be competent to decide about the content and may not be ultimately responsible for data handling. However, they do deal with e-consumer data and need to have a certain degree of responsibility. There are also situations where the sellers do not have complete control of the data but still may facilitate breaches of personal information. Moreover, the integration of e-commerce and mobile phone usage/m-commerce makes it a necessity for Tanzania initiatives to address the matter in specific; putting in place a clear demarcation of obligations and responsibilities between these service providers.

These provisions highlight the importance of having a realistic and practical approach when trying to define responsibilities and obligations in personal information handling in e-consumer transactions. It is evident that the scope needs to be relevant to the current situation and practice in Tanzania.

The guidelines also provide for data collection principles where they set out the limit, quality, purpose, use limitation, openness and individual participation principles.<sup>228</sup> These principles are important as they set out standards and limits for data collection and handling. However, as the guidelines were not set with e-consumers in mind, it is necessary that when countries such as Tanzania adopt the principles, they should do so keeping their e-consumer concerns in mind. Therefore, proper provisions requiring limits on the collection of personal data of e-consumers, lawful and fair means of collection, knowledge or consent of the e-consumers and the relevancy to the purposes for which they are to be used, have to be addressed.

It is also essential to require that the purposes for data collection be notified to e-consumers before they provide such data, and the data collected to be used according to the purposes given to e-consumers. Moreover, all parties responsible for data collection should be asked to secure such data to the best of their ability. It is

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<sup>227</sup> Ibid Part One.

<sup>228</sup> Ibid Part Two.



important the responsibility for data security and protection in general should reflect the party's ability to render such protection, and their role in data and information handling. This is especially true when dealing with other modes of e-commerce such as C2C e-transactions.

It is noted here that the data security referred to in this part is restricted to the field of e-commerce and e-consumer protection. There should still be general data and security initiatives addressing all other aspects of data handling issues. There is a need to address specific issues concerning e-consumer protection to ensure sufficient protection of the e-consumers; and prevent the need of them to resort to other aspects of laws.<sup>229</sup>

The guidelines further give individuals the right to have access to their own personal information<sup>230</sup> where it states that an individual should have the right to: confirmation of whether or not the data controller has data relating to him/her; to have communicated to him/her, data relating to themselves within a reasonable time; in a reasonable manner; and in a form that is readily intelligible to him/her; to be given reasons if a request) is denied, and to be able to challenge such denial; and to challenge data relating to him/her and, if the challenge is successful, to have the data erased, rectified, completed or amended.

This provision was not intended for data collected by e-sellers from e-consumers and hence if applied as is, will likely cause uncertainties. However, the concept presented in this provision is essential and should be adopted for e-consumers. E-consumers should have the right to inquire about the information e-sellers have relating to them anytime they wish to do so, and to have the right to request sellers to amend, rectify, complete, erase or alter the data in any manner. However, this should be done cautiously to avoid further consumer violations, misleading acts or fraud.

Suffice to say, even though recommendations have been given on how to adopt and incorporate these guidelines into Tanzanian initiatives, it is important to keep in mind

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<sup>229</sup> By doing so we preserve the purpose of consumer protection by safeguarding consumer interests through public policies and avoid the involvement of other areas of law such as criminal law.

<sup>230</sup> *OECD Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data* 1980, Guideline 13.

that the guidelines should be used as a guide only. This is due to the fact that the Tanzanian social and economic background places privacy issues in a different position. Given Tanzania's position and characteristics, the whole concept of privacy takes on a different meaning. The potential and limits of privacy protection also widen. Personal information and sensitive information also has a different and broader meaning. What may be considered as public data in other parts of the world may not necessarily be considered public data in Tanzania.

A good example of this is the local government system with the presence of community leaders known as ten cell leaders; these leaders are responsible for regulating everyday life with activities ranging from keeping peace and order, assisting in business, social and economic activities such as opening bank accounts, to adjudicating marital and other family affairs. They collect and keep a lot of data. Among other implications, this brings a need to consider what should be considered as private or sensitive data that needs to be protected; and how and to what level it should be protected. It should be kept in mind that data protection touches several aspects of law,<sup>231</sup> and in order to work it needs effective measures in all of those aspects it touches. Therefore, profound measures are needed to ensure that not only data controllers but the systems in place facilitate data protection and better personal information handling procedures.

Furthermore, the development in technology is still growing, and so is access through resources such as computers and internet. The most accessible internet is through mobile phone service. Hence the use of public computers through internet cafes or mobile phone data is the common internet access method for the majority of the population. These and other economic problems such as massive and extensive electricity power cuts and power rationing gives the Tanzania e-consumers different characteristics which need to be considered when addressing personal information issues and consumer protection issues in general. Therefore, even though the available initiatives addressed at global, regional and national levels are relevant in universal issues of personal information handling, they may not offer solutions to Tanzania's unique personal information handling issues.

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<sup>231</sup> Such as criminal law and intellectual property law.

(ii) Initiatives at the regional level

*The Directive on Processing and Free Movement of Data*<sup>232</sup>

The *Directive on Electronic Commerce*, which is the main focus when discussing European Union initiatives under this thesis, offers little on data protection and privacy issues. It is argued that ‘it steers clear’ from such discussions.<sup>233</sup> In order to shed light on personal information handling issues, other European initiatives such as the *Directive on Processing and Free Movement of Data* will be discussed.

This Directive was originally passed to deal with the processing of personal information in large computerised databases<sup>234</sup> and most likely did not foresee problems that would arise from e-commerce as e-commerce initiatives were addressed years later in 2000.<sup>235</sup> Hence it can be argued that the Directive was not intended to protect e-consumers while they transact online and its provisions are likely to cause uncertainty when applied to such scenario. This can be seen by the application of the Directive in the case of *Bodil Lindqvist*<sup>236</sup> where a private citizen who put information on a website during her computer class, was held accountable under the Directive. The case showed the scope and application of the Directive,<sup>237</sup> which can be argued to have been identified as overreaching,<sup>238</sup> broad and problematic.<sup>239</sup> This is evidenced further by moves to review and replace the Directive by the European Commission.<sup>240</sup>

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<sup>232</sup> Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (*‘Directive on Processing and Free Movement of Data’*) [1995] OJ L 281, p 31.

<sup>233</sup> Flora J Garcia, ‘Bodil Lindqvist: A Swedish Churchgoer’s Violation of the European Union’s Data Protection Directive Should Be a Warning to U.S. Legislators’ (2005) 15 *Fordham Intellectual Property, Media and Entertainment Law Journal* 1204, 1213 <<http://ir.lawnet.fordham.edu/iplj>>.

<sup>234</sup> Rebecca Wong, ‘Data Protection Directive 95/46/EC: Idealisms and Realisms’ (2012) 26 (2-3) *International Review of Law, Computers & Technology* 229, 230 <[http://works.bepress.com/rebecca\\_wong/14](http://works.bepress.com/rebecca_wong/14)>.

<sup>235</sup> *Directive on Electronic Commerce*.

<sup>236</sup> See *Criminal Proceedings Against Bodil Lindqvist* (C-101/01) [2003] ECR I-12971.

<sup>237</sup> Garcia, above n 233, 1206.

<sup>238</sup> Wong, above n 234.

<sup>239</sup> Garcia, above n 233, 1230-5.

<sup>240</sup> The European Commission will be replacing the *Directive on Processing and Free Movement of Data* with *European Data Protection Regulation*; see *European Parliament legislative resolution of 12 March 2014 on the proposal for a regulation of the European Parliament and of the Council on the*

The Directive also fails to face up to the new challenges in data protection that grow with the growth of the internet; hence the need to be updated.<sup>241</sup>

The uncertainties arising from *Directive on Processing and Free Movement of Data* continue to be revealed when implemented at a national level. The UK response to the Directive, *The Data Protection Act 1998 & Personal Privacy*,<sup>242</sup> was labelled as a ‘cumbersome and inelegant piece of legislation.’<sup>243</sup>

It can be argued that the application of the Directive’s provisions has been too general and wide that they can easily catch innocent consumers.<sup>244</sup> This is a major lesson that can be drawn by countries such as Tanzania when enacting laws for their countries.

It is essential that the scope, interpretation and application of any initiatives enacted are clear. Personal information issues touch on different aspects of the law; however, it is essential to have a specific provision regulating the information collected during e-transactions. It is essential that the responsibilities and obligations set out for parties are realistic, can be implemented and are limited to the targeted group only. The *Directive on Processing and Free Movement of Data* states that it does not apply to the processing of data by a natural person in the course of purely personal or household activities;<sup>245</sup> however, a private citizen who was doing homework for personal advancement through a computer class was found liable under the Directive.<sup>246</sup> This should alert the lawmakers as such scenarios are likely to occur more especially where private citizens engage in C2C e-transactions by selling off their unwanted goods. There is a need to set out clear rules for those in the playfield

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*protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation) (COM(2012)0011 – C7-0025/2012 – 2012/0011(COD)); Wong, above n 234.*

<sup>241</sup> Wong, above n 234, 229.

<sup>242</sup> See Ian J Lloyd, *Information Technology Law* (Oxford University Press, 6<sup>th</sup> ed, 2011) 35.

<sup>243</sup> See *Campbell v MGN Ltd* [2003] QB 633, [72]; See Philip Coppel, *The Data Protection Act 1998 & Personal Privacy* (19 March 2012) <<http://www.statutelawsociety.co.uk/library/>>.

<sup>244</sup> Douwe Korff, *EC Study on Implementation of Data Protection Directive (Study Contract ETD/2001/B5-3001/A/49): Comparative Summary of National Laws* (2002) <[www.garantepriacy.it/.../Stato+di+attuazione+della+Direttiva+95-46-CE](http://www.garantepriacy.it/.../Stato+di+attuazione+della+Direttiva+95-46-CE)>; Rebecca Wong, ‘Data Protection: The Future of Privacy’ (2011) 27 *Computer Law and Security Review* 53 <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1758796&download=yes](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1758796&download=yes)>; Wong, above n 234, 229-44.

<sup>246</sup> See *Criminal Proceedings Against Bodil Lindqvist* (C-101/01) [2003] ECR I-12971.

and ensure protection for all.

Several points should be considered when addressing personal information handling issues. For instance, to what extent or how much information should qualify for breach of privacy? In the *Bodil Lindqvist* case, there was a minor exposure of personal information;<sup>247</sup> perhaps the same information might have been available in the yellow pages or through other public domains. Yet, single information such as an email address may be enough to make a consumer suffer from spam, cyber stalking, identity theft and other related issues.<sup>248</sup> Hence, there is a need to consider the extent of information that should be protected, the extent of such protection and the responsibility of those who may hold such information. It would be proper to expect different levels of responsibility among businesses, professional information collectors/controllers and C2C seller-consumers or private individuals.

One of the main aspects of all the initiatives recommended in this thesis is its implementation. This does not only include the smooth application/availability of such initiatives but also access to e-consumers, through supervision of the provisions, and granting the said rights or protection to aggrieved e-consumers. This will be effectively achieved through establishing specific instruments that foresee implementations of such initiatives. As seen through the application of the *Directive on Processing and Free Movement of Data*, the application of provisions intended for businesses or professional data controllers cannot realistically be applied to individuals such as those involved in C2C, for example in social media.<sup>249</sup> The provisions become 'highly impractical if not impossible.'<sup>250</sup>

Moreover, any initiatives put in place need to take into consideration the position of small businesses and services. For instance, big businesses may have more control of data and information they collect, but small businesses may be using cloud computing as it is less costly; however, this may leave them with little control as in cloud computing a network of remote servers hosted by others on the internet are used to

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<sup>247</sup> Garcia, above n 233, 1233; Wong, above n 234, 230.

<sup>248</sup> This point is also emphasised in the initiatives at the national level discussion below.

<sup>249</sup> Daniel Garrie et al, 'Data Protection: The Challenges Facing Social Networking' (2010) 6 *Brigham International Law and Management Review* 132.

<sup>250</sup> Ibid.

store, manage, and process data, rather than a local server or a personal computer.<sup>251</sup>

Without prejudice, it would be wrong to assume that the *Directive on Processing and Free Movement of Data* is completely without merit. There are provisions that provide good examples on what should be done when addressing personal information handling issues of Tanzania e-consumers. For instance, the Directive<sup>252</sup> prohibits the processing of sensitive data. This is data which reveals racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership, and data concerning one's health or sex life.<sup>253</sup> This is an important element to consider especially for Tanzania e-consumers as such information can easily create unrest and possible violations of human rights.<sup>254</sup> Initiatives put in place should reflect the importance of protecting such information data, especially in e-transactions where there is no need to reveal it.

There are other instruments under the European Union which also regulate data and personal information handling such as the *Directive on Privacy and Electronic Communications* as amended, which was designed to regulate the electronic communications sector and telecommunications sector.<sup>255</sup> This Directive complements the *Directive on Processing and Free Movement of Data* and deals with the processing of personal data relating to the delivery of communication services.<sup>256</sup>

The Directive applies to public communication services. These are defined to mean services provided for remuneration in the conveyance of signals on electronic

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<sup>251</sup> It is acknowledged here that the subject of cloud computing and data protection is broad and may even encompass security aspects of the internet; however, this discussion will not be carried any further.

<sup>252</sup> *Directive on Processing and Free Movement of Data* art 8.

<sup>253</sup> *Ibid* art 8 (2).

<sup>254</sup> There has been a recent rise in unrest between religious affiliations in Tanzania where it is alleged that Islamic groups have been burning down churches and beating up Christians. See East Africa Correspondent, 'Muslim Extremists Attack Visiting Preacher on Tanzania's Zanzibar Island', *Morning Star News* (online), 24 January 2014 <<http://morningstarnews.org/2014/01/muslim-extremists-attack-visiting-preacher-on-tanzanias-zanzibar-island/>>; Michael Rossmann, 'Trouble in Tanzania', *America: The National Catholic Review* (online), 30 September 2013 <<http://americamagazine.org/issue/trouble-tanzania>>. Similarly, there have been political unrests where several people have been attacked and killed during political rallies. See Fumbuka Ng'wanakilala, 'Zanzibar Islamists Burn Churches, Riot – Police', *Reuters* (online), 27 May 2012 <<http://www.reuters.com/article/2012/05/27/zanzibar-protest-idUSL5E8GR1HB20120527>>.

<sup>255</sup> See Europa, *Data Protection in the Electronic Communications Sector* (22 April 2014) <[http://europa.eu/legislation\\_summaries/information\\_society/legislative\\_framework/124120\\_en.htm](http://europa.eu/legislation_summaries/information_society/legislative_framework/124120_en.htm)>.

<sup>256</sup> *Ibid*.

communications networks.<sup>257</sup>

Two key things that can be drawn from the Directive are the regulations of unsolicited communications (spam)<sup>258</sup> and cookies.<sup>259</sup> The Directive offers an opt-in approach to unsolicited emails and other electronic communication for marketing purposes where unsolicited communications may only be sent with prior agreement of the recipient.<sup>260</sup> At first, this seems to be a good move as it controls delivery of unsolicited emails to e-consumers. However, it is important to consider whether this will be beneficial or harmful to e-consumers, especially those faced with limited resources and sources of information such as in third world countries like Tanzania. One thing to keep in mind is the unsolicited communications for the purpose of marketing may also contain information that may empower e-consumers. How does a Tanzania e-consumer become educated about the products in the market, competitions, demands, scarcity and other relevant product or service information? They may not know they even exist; and hence lack of exercising their opportunity of opting in. It is argued that opt in alternatives stop the free flow of information, reduces competition and raises prices; and will increase the burden of unsolicited calls.<sup>261</sup>

There is also a danger for businesses, especially small scale ones; from being hindered to conduct business online; as part of the success of business is to advertise for customers. For a growing country like Tanzania, this option may create more harm to both parties. A balance can easily be struck between the opt in/opt out options so as to ensure benefits for both parties. It is, however, important to differentiate unsolicited marketing communications from paid marketing services which consumers receive. This is where consumers are being charged for receiving such information, such as

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<sup>257</sup> Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services ('Framework Directive') OJ L 108, p 33, art 2.

<sup>258</sup> Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector ('Directive on Privacy and Electronic Communications') [2000] OJ L 201, p 37, art 13.

<sup>259</sup> Directive on Privacy and Electronic Communications, Recital 25 of the Preamble and art 5(3) of 13.

<sup>260</sup> Directive on Privacy and Electronic Communications, art 13.

<sup>261</sup> Fred H Cate and Michael E Staten, *Protecting Privacy in the New Millennium: The Fallacy of Opt-In* (2000)

<<http://www.google.com.au/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0CCoQFjAA&url=http%3A%2F%2Fhome.uchicago.edu%2F~mferzige%2Ffallacyofoptin.pdf&ei=Po1cU4SXXK8jMkQWN7YHwBA&usq=AFQjCNFdrGUFyexo6ZLX9S7o5R47t0xxMQ&bvm=bv.65397613,d.dGI>>.

messages sent through mobile phone services.<sup>262</sup> It is essential to ensure that e-consumers do not incur advertising costs they have not agreed to and that advertisers do not use e-consumers for their own expenses.

This uncertainty, with regard to opt in/opt out alternatives has been experienced by e-consumers and been a topic of discussion in other parts of the world.<sup>263</sup> Research has revealed that US consumers are not comfortable about opt in, opt out options to protect their data.<sup>264</sup>

It can be argued here that a 'one size fits all approach' in dealing with unsolicited communications will not work; especially at this age where information is more than power. Different approaches, such as filtering of 'bad spam' by internet service providers from the server point may be considered. The key is to find a measure that will not cause harm to any of the involved parties.<sup>265</sup>

The Directive also requires users to give consent for cookies; and they have to receive clear and comprehensive information about the reasons and purposes for storage or access. This requirement is beneficial to consumers; however may be a burden to website owners to the point of being impossible to be implemented. Moreover, as it is not clarified how consent may be deemed to have been received by the users, it may also be a burden to e-consumers and hard to implement.

### (iii) Initiatives at the national level

#### *Australian Guidelines for Electronic Commerce (March 2006)*

These guidelines are very similar to the provisions under the OECD as the basis of

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<sup>262</sup> Refer to Chapter Three and Four describing concerning issues facing e-consumers in Tanzania.

<sup>263</sup> Ibid; Pam Baker, *US Consumers Not Excited About Opt-In, Opt Out Options To Protect Their Data* (10 February 2014) FierceBigData <<http://www.fiercebigdata.com/story/us-consumers-not-excited-about-opt-opt-out-options-protect-their-data/2014-02-10#ixzz303YrvXBb>>; 'E-Mail Marketing - Opt-in and Opt-out Methods' (26 April 2014) <<http://ecommerce.hostip.info/pages/402/E-Mail-Marketing-OPT-IN-OPT-OUT-METHODS.html>>; James Plummer, 'Mandating Opt-In May Cause Consumers to Be Left out' (May 2002) <<http://www.highbeam.com/doc/1G1-88107560.html>>.

<sup>264</sup> Baker, above n 263; see also 'E-Mail Marketing - Opt-in And Opt-out Methods', above n 263.

<sup>265</sup> This argument perhaps would take a different direction where other forms of privacy are concerned, such as tracking people's mobile phones and identifying their location and all. However, the discussion is limited unsolicited communications for marketing purposes.



these principles is the OECD Guidelines<sup>266</sup> and hence they reflect the OECD principles discussed above. Therefore, not all the guidelines will be discussed here.

Guideline 38 requires businesses to comply with the National Privacy Principles (NPPs) set out in schedule 3 to the Australian *Privacy Act 1988* (Cth). These principles provide for a guideline in data collection and handling; and gives the consumers right to the information collected relating to them.

These principles have been the subject of reviews and recommendations by the Australian Law Reform Commission (ALRC) and scholars.<sup>267</sup> Principle 1 provides for obligations to collecting personal information where information needs to be collected for a lawful purpose directly related to a function or activity of the collector; and the information needs to be necessary for, or directly related to, the purpose. The provision also prohibits personal information to be collected by unlawful or unfair means. Several recommendations have been given to this provision<sup>268</sup> including redefining personal information.

Defining the meaning of personal information is an important element in making this provision effective. It is evident that personal information in the online environment may include information that may not be as personal in the offline world. This is due to the vulnerable condition internet users face. Information on the internet can be accessed in a short time, throughout the world and can be used in several ways, a situation which does not exist in the offline world. Simple information may easily lead to identity theft, spam, information phishing, illegal data encryption, fraud and other violations. Therefore, there is a need to widen the meaning of personal information.

Principle 2 deals with use and disclosure of information where organisations are prohibited from using or disclosing personal information for a purpose other than the primary purpose for which it was collected. The provision gives exceptions where there is consent from individual, the secondary purpose is related to the primary

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<sup>266</sup> See the Preamble of the *Privacy Act 1988* (Cth).

<sup>267</sup> Australian Law Reform Commission, above n 220; Greenleaf, Waters and Bygrave, above n 220.

<sup>268</sup> Australian Law Reform Commission, above n 220, proposal 3-5; Greenleaf, Waters and Bygrave, above n 220, 4.

purpose of collection, in case the personal information is sensitive information, it is directly related to the primary purpose of collection and where the individual would reasonably expect the organisation to use or disclose the information for the secondary purpose.

The provision also provides exceptions in the use of non-sensitive information in direct marketing where: such information can be used where it is impracticable for the organisation to seek the individual's consent before that particular use; where the organisation will not charge the individual for giving effect to a request by the individual to the organisation not to receive direct marketing communications; where the individual has not made a request to the organisation to not receive direct marketing communications; where in each direct marketing communication with the individual, the organisation draws to the individual's attention, or prominently displays a notice, that he or she may express a wish not to receive any further direct marketing communications.

The provision also requires each written direct marketing communication by the organisation to the individual (up to and including the communication that involves the use) to set out the organisation's business address and telephone number and, if the communication with the individual is made by fax, telex or other electronic means, a number or address at which the organisation can be directly contacted electronically.

The provision also lists several other conditions where information may be disclosed including in preventing harm to an individual's life, health or safety; or public health or public safety; or in preventing unlawful activity or if it is a legal requirement.

Among the challenges that have been pointed out with regard to this provision is the concept of consent.<sup>269</sup> It is not clear what consent means in accordance with the principle and how it should be given.

The principle sets out important guidance in the disclosure of information, which should be adopted for Tanzania, as it currently has no controlling initiatives for such

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<sup>269</sup> Greenleaf, Waters and Bygrave, above n 220, 8-10.

e-consumer personal information. However, the adopting of these initiatives should be through modification in wording and requirements so as to cater for the Tanzania environment. The meaning of consent and how it should be obtained from individuals needs to be clearly stated. It is important to ensure that the consent of transacting with a particular business is not considered as consent for other things including collection and use of personal information. Moreover, the provisions give out the opt out options for consumers as far as non-sensitive data is concerned. In today's world, consumers face a major problem of spam that one way of dealing with it is to require businesses to ask the consumers to opt in to communications, therefore, facilitating opt out options is likely to increase the spam problem for the consumer.

Principle 3 provides for data quality by requiring an organisation to take reasonable steps to ensure that the personal information it collects, uses or discloses is accurate, complete and up-to-date. This is an important requirement, however, it is not extensive enough especially in ensuring data quality in the online environment. There is a need to ensure that the data collected is necessary and relevant to its purpose. Furthermore, there is a need to specify what should be considered as a reasonable step, especially when such a provision is addressing issues under the Tanzania jurisdiction.

Principle 4 provides for data security where organisations are required to take reasonable steps to protect the personal information they hold from misuse and loss and from unauthorised access, modification or disclosure. They should also take reasonable steps to destroy or permanently de-identify personal information if it is no longer needed. This is an important principle in maintaining the security of data of personal information and in addressing issues facing Tanzanian e-consumers.<sup>270</sup> It is essential that this principle be addressed further and adopted in a way that may suit the Tanzania environment, keeping in mind that individual sellers and consumer sellers may lack the capacity required to maintain data security; and hence causing uncertainty over such protection measures. There is a need to set a standard as to what may be considered as reasonable steps. Similarly, there is a need to give basic guidance as to what may entail misuse, loss and unauthorised access, modification

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<sup>270</sup> Refer to the issues at the beginning of this discussion, and also Chapter Three.

and disclosure.

Principle 5 provides for openness where organisations are required to have clearly expressed policies on their management of personal information and to take reasonable steps to inform a person of the personal information relating to them and why and how it uses such information. This is an essential provision to be adopted for Tanzania initiatives, but similar to other provisions discussed above, needs to be modified to fit Tanzania circumstances. The principle of openness is likely to work best under the Tanzania environment because it facilitates e-consumers to be informed.

The principle should be extended to require openness over all activities concerning personal information. This should include openness in all aspects of principles presented under the schedule. This is necessary because the state and nature of technology in Tanzania does not allow consumers full and easy access to the internet. Hence, it may be challenging to reach out to consumers who may not be easily reached or kept informed and updated with the current state of matters. Therefore, apart from requiring businesses and data collectors to reach out to them, there should be a requirement of openness where consumers may be able to access readily available information regarding the business and other relevant information.

Principle 6 requires organisations to provide individuals with access to personal information held relating to them. The principle lists several exceptions to this requirement, including: where providing such access would pose a serious threat to the life or health of the individual; where it would have an unreasonable impact upon the privacy of other individuals; or where the request for access is frivolous or vexatious; the information relates to existing or anticipated legal proceedings between the organisation and the individual, and the information would not be accessible by the process of discovery in those proceedings; providing access would reveal the intentions of the organisation in relation to negotiations with the individual in such a way as to prejudice those negotiations; or providing access would be unlawful. Several other exceptions are also listed.<sup>271</sup>

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<sup>271</sup> *Privacy Act 1980* (Cth), principle 6.

The provision further provides that if an organisation charges for providing access to personal information, those charges must not be excessive and must not apply to lodging a request for access. Furthermore, if an organisation holds personal information about an individual and the individual is able to establish that the information is not accurate, complete and up-to-date, the organisation must take reasonable steps to correct the information so that it is accurate, complete and up-to-date.

The provision further provides for disagreements on information held where it provides if the individual and the organisation disagree about whether the information is accurate, complete and up-to-date, and the individual asks the organisation to associate with the information a statement claiming that the information is not accurate, complete or up-to-date, the organisation must take reasonable steps to do so. Furthermore, an organisation must provide reasons for denial of access or a refusal to correct personal information.

Issues addressed in these principles are important and need to be addressed for e-consumer personal information protection. However, the principle addresses data access and correction in general; therefore the adoption of this principle should focus on e-consumers interests and the nature of the transactions. For instance, as consumers give their information voluntarily while they transact with the seller, this information should be readily accessible to them free of charge, unless other costs are involved such as faxing and printing such information; or involves other resources that will incur extra costs for the seller. Charging consumers for accessing their information will undermine efforts to make the information accessible.

E-consumers should also be able to correct the information or require such information be discarded anytime they wish to do so. There should be very few exceptions with regard to correction and discarding personal information collected through electronic transactions. This may be where such information is required by law, in cases where such information may assist in other aspects of consumer protection or where it compromises other consumers. In case these exceptions have to be used; the provision from the principle above in cases of disagreement, where a statement that the information is not accurate, complete or up-to-date; should be used.

This will give the opportunity to the individual disagreeing on the available information to be heard.

Principle 8 provides for anonymity where it states that wherever it is lawful and practicable, individuals must have the option of not identifying themselves when entering transactions with an organisation. This provision was not intended for consumers of electronic transactions; however, it is necessary to address such in electronic transactions. Anonymity may be one way to protect e-consumers against a breach of their privacy, however, there is a danger this opportunity will be abused and used by fraudsters against both consumers and sellers. Moreover, the nature of online transactions may not facilitate anonymity. However, the principle of anonymity can be applied with limitations. E-consumers should be able to transact anonymously where possible and should be ready to provide information in case there is a need to do so. This may be where there is a problem after an anonymous transaction. On the other hand, it should be a requirement for all businesses and sellers to fully identify themselves, their address and how they can be contacted so as to enhance consumer protection in electronic transactions.

Principle 9 addresses trans-border data flows where it requires organisations to ensure that the personal information and data transferred outside Australia is protected. The principle requires that personal information should only be transferred: where the organisation believes that it is going to be protected by law, binding scheme or contract; where the individual has consented to transfer; where transfer is necessary for performance or a conclusion of a contract; or where the transfer is for the benefit of the individual; it is impracticable to obtain the consent of the individual to that transfer; or where the individual would be likely to give consent or the organisation has taken reasonable steps to ensure that the information which it has transferred will not be held, used or disclosed by the recipient of the information inconsistently with the NPP.

Addressing trans-border transfers of data is an important element in protection of e-consumers. The nature of transaction is cross border and hence there is a flow of data from a local country to a foreign country. It is important to ensure that consumers are very well protected.

The principle has faced criticism<sup>272</sup> where it has been argued that it has weak control over onward transfer. The principles work on the reasonable belief that the recipient in a foreign country is subject to a law, binding scheme or contract which effectively upholds principles substantially similar to the NPP.<sup>273</sup> Furthermore, principle 9 prohibits transfers of personal information by an organisation to someone in a foreign country unless one of six conditions given is satisfied. This means, if one of the conditions is satisfied, then the Australian organisation which transferred the data does not have any liability under the Act for any privacy breaches which may occur subsequently; and therefore there is a need to ensure that the conditions do not allow transfers which create unjustified privacy risks.<sup>274</sup>

The principle provides for a wide range of conditions, some of which may not work well in electronic consumer transactions and also within Tanzania. Hence, the principle should be adopted and readdressed to fit the local situation facing e-consumers. For instance, the provision states that transfer can be made if it is impractical to obtain the consent of the individual to that transfer.

This provision is likely to render injustices in Tanzania where technology is growing and e-consumers face technological and economic barriers. On the face of it may seem impracticable to obtain consent from a Tanzanian e-consumer whose access of internet is via a public internet café, with the likelihood of intermittent power cuts;<sup>275</sup> however, this is not the case. There are still some ways for consent to be obtained even from individuals facing this scenario. There is therefore, a need to have a system or principles that will work in the local environment. There is a need to define and set a guideline as to what will be considered as 'impracticable' in Tanzania.

It is also important to emphasise that the information subject to discussions should be

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<sup>272</sup> Graham Greenleaf, 'Private Sector Privacy: Problems of Interpretation' (2001) *CyberLRes* 3 <<http://www2.austlii.edu.au/~graham/CyberLRes/2001/3/#Heading22>>.

<sup>273</sup> Ibid.

<sup>274</sup> Ibid.

<sup>275</sup> David Clarke and Toby Chopra, 'Tanzania Announces Indefinite Power Outages', *Reuters* (online), 25 June 2011 <<http://www.reuters.com/article/2011/06/25/tanzania-power-idUSLDE75O07C20110625>>.

in relation and relevant to the transaction that e-consumers have engaged in. This is to ensure that the provision is not used for transferring of personal information other than that obtained during or in relation to the electronic transaction.

Suffice to say, these provisions alone will not afford absolute protection of trans-border data flows as the subject is wide and needs to be addressed extensively. Recommendations will be made for Tanzania to draft other general relevant laws that will render more protection to e-consumers in Tanzania.

Principle 10 deals with sensitive information where it prohibits organisations from collecting sensitive information about an individual unless the individual has given consent, or it is a legal requirement or the individual is unable to give such consent and it is necessary to prevent or lessen a serious and imminent threat to the life or health of the individual.

According to the Act<sup>276</sup>, sensitive information means information or an opinion about an individual racial or ethnic origin; political opinions; membership of a political association; religious beliefs or affiliations; philosophical beliefs; membership of a professional or trade association membership of a trade union; sexual preferences or practices; criminal record; health information; or genetic information about an individual that is not otherwise health information.

This provision is important in safeguarding the interests of e-consumers and should be adopted accordingly. There is a need to reword the provision to fit local circumstances. For instance, sensitive information in Tanzania may extend to marital status especially where both monogamous and polygamous marriages are practised. Also, as it has been pointed out in other provisions requiring consent, the word consent and how one is able or not able to give consent needs to be used and viewed within the local context.

#### ***Canadian Code of Practice for Consumer Protection in Electronic Commerce 2004***

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<sup>276</sup> *Privacy Act 1988* (Cth) s 6.



Principle 4 of the *Canadian Code of Practice* provides for different guidelines and requirements for personal information collection and personal information handling. Principle 4.1 of the Code incorporates other general guidelines and privacy principles required for personal information collection and personal information handling. The principle requires vendors to adhere to the principles set out in appendix 3 with respect to the personal information they collect from consumers through e-commerce activities.

Appendix 3 contains a *Model Code for the Protection of Personal Information*, which provides 10 principles that are similar to the Australian NPP and the OECD privacy principles. Therefore, no further discussion on these principles will be carried out here as the same has been done previously.

Apart from the principles incorporated in appendix 3, the *Canadian Code of Practice for Consumer Protection in Electronic Commerce* further provides several protective privacy requirements. Principle 4.2 of the Code requires vendors to make their privacy policy easily accessible from the home page of their website or at a reasonably early stage of consumers' navigation, and whenever personal information is either requested or collected.

The principle further lists information that must be disclosed as part of the privacy policy, including specific kinds and sources of information being collected and maintained online; the purposes for which the information is collected; how that information is being used; to whom the information may be disclosed; the choices available to consumers regarding the collection, use and disclosure of their personal information; how they may exercise and change these choices; and the implications of such choices. Businesses need to inform consumers how they may review, and when necessary, correct or remove such information; and when the website uses cookies, how and why they are used and the consequences, if any, of refusing to accept a cookie.

This principle is similar to those provided under appendix 3 of the Code. It can be argued that they complement each other. This principle is more specific to activities online and does take into consideration the online environment. The principle should

be adopted with slight changes especially to the wording. For instance, requiring consumers be informed about specific kinds and sources of information being collected and maintained online excludes other possible means that online businesses may employ during e-commerce in Tanzania, such as mobile phones, and there is a need to be general enough to include all means possible. There is also a need to include the manner in which such information should be provided so as to ensure that the intended audience do not miss the information. The main concern is conspicuousness and easy identification of such information. Consumers should be aware as to where such information is provided in the website.

Principle 4.3 provides that vendors should limit their collection, use and disclosure of personal information to that which a reasonable person would consider appropriate in the circumstances. This provision is necessary although general; and leaves a gap where individual cases will need to be considered according to the facts. There is a need of being specific and direct when addressing consumer problems as this will create uniformity in consumer protection principles and offer certainty to consumers. The above similar provisions requiring vendors to collect information necessary and related to the transactions are preferred over this provision.

However, the main idea being presented in this provision will be taken into consideration. Hence there is a need to ensure that Tanzania initiatives limit the collection, use and disclosure of personal information to only what is necessary. The necessity factors should be clearly listed and be directly connected to the transaction.

Furthermore, the recommended provisions to be adopted should specifically exclude information which is likely to do more damage or harm where it is not necessary to collect such information. For instance, information that tends to label consumers according to their race, religion and political affiliation should be excluded, especially in a consumer environment such as in Tanzania where such issues are very sensitive.<sup>277</sup>

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<sup>277</sup> See discussion of recent unrest, above n 254.

## *Electronic Communications and Transactions Act 2002*

Section 43.1(p) requires sellers in electronic transactions to inform consumers on the security procedures and privacy policy of that supplier in respect of payment, payment information and personal information.

The provision does not provide protection regarding personal information of the e-consumers. The sellers are supposed to inform consumers on the security procedures and privacy policy but there is no clear set of rules ensuring that the sellers have appropriate security procedures and a privacy policy. The provision does not set out the manner in which consumers need to be informed. Consequently the provision is lightweight and can easily be overlooked by the sellers. It is argued that these provisions are not taken seriously.<sup>278</sup>

It is not clearly indicated in the *Electronic Communications and Transactions Act* whether this provision is subject to other provisions on personal information protection. On the face of it, the provision stands alone. However, it is noted that the Act has other personal protection provisions which may render greater consumer protection. These provisions are discussed below.

Section 50 and 51 of the Act sets out principles covering collection of personal information obtained through electronic transactions where the data controller is required to have the express written permission from the consumer for collection, collation, processing or disclosure of any personal information regarding the consumer.<sup>279</sup> The requirements set out in these provisions including the requirement for permission seems to be similar to the provisions from other jurisdictions discussed above; however, a note is taken from the requirement of written permission under the South African Act. According to section 12 of the Act, the written requirement will be met if it is in the form of data message and is accessible for subsequent reference.

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<sup>278</sup> Rabelani Dagada, Mariki Ellof and Lucas Venter, *Too Many Laws But Very Little Progress! Is South African Highly Acclaimed Information Security Legislation Redundant?* (2009) <<http://uir.unisa.ac.za/xmlui/bitstream/handle/10500/2660/dagada.pdf?sequence=>>.

<sup>279</sup> This provision has been discussed extensively in the section highlighting fraud initiatives. However, it is also essential to include it here for data control perspective.

Furthermore, the provision requires the data controller to disclose in writing to the data subject the specific purpose for which any personal information is being requested, collected, collated, processed or stored; and not to use the personal information for any other purpose than the disclosed purpose without the express written permission of the data subject. The significance of the requirement of written documents in these provisions is that consumers will be provided with evidence for their records which is an essential element in electronic transactions. However, the provision is not broad enough to show how this will be attained; but rather it is strict on the rule to the point of making it impractical and unrealistic.

A question posed under the discussion above, which is essential to repeat here is what constitutes express written permission and acceptance of such permission in the online or electronic world? It is also important to consider whether it is realistic to be achieved in a short time span when e-consumers want to quickly buy something off the internet? In other words, can these requirements match the pace of the electronic world? Unless these questions are clearly answered, it will be unrealistic for both e-sellers and e-consumers to fulfil these requirements.

It has been revealed that is a danger of burdening consumers with ‘incomprehensible consent forms’<sup>280</sup> in the process of fulfilling this requirement. It is essential that the wordings of the provision be used in a way that reflects these realities.

It is worthwhile to note here that section 50 of the Act provides that data controllers may voluntarily subscribe to these principles outlined in section 51. This gives uncertainty as to the binding nature and effectiveness of these principles, and the protection provided to consumers. Furthermore, section 50 (4) provides that the rights and obligations of the parties in respect of principles outlined in section 51 are governed by the terms of any agreement between them. This seems to confirm the fact that sellers are not bound by these principles.

It is also essential to ensure that the provisions target the right people and accord appropriate responsibilities to the stakeholders. For instance, other stakeholders

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<sup>280</sup> Kosta, above n 53, 219.

involved in personal information protection are such as the mobile phone service providers, internet service providers and social network and blogs owners/operators. These stakeholders have different capabilities and power when it comes to control of the internet and electronic data. Sellers who receive e-consumer information may have a limited role in protecting such information, including not making it easily accessible to third parties, but they may be limited in terms of the use of advanced technology which internet service providers and mobile phones service provides may have.

For instance, sellers in social media and forums are individuals who might even be e-consumers who occasionally sell their unwanted belongings in such forums. These kinds of sellers may not be in a position to fulfil all the requirements of this provision.<sup>281</sup> Similarly, internet service providers are in a far better position than website owners/sellers. It is questionable whether small and individual sellers have the power to fulfil all the requirements from the provisions. For instance, can they store information for a year or more? If the reality of Tanzanian small sellers and social media sellers is examined, this will be answered in the negative. Such drawbacks can be answered by requiring sellers/data collectors to store data according to their individual capacity where a reasonable minimum period for different groups of data collectors and exceptions to such requirements may be offered. A different way of enabling data storage may also be suggested. However, as pointed out in the discussion above, storage requirements may hinder e-consumer protection and prevent e-consumers from their 'right to be forgotten.'<sup>282</sup>

Given this reasoning, there is a need to clearly define who is a data controller. According to the South African *Electronic Communications and Transactions Act*, data controller means 'any person who electronically requests, collects, collates, processes or stores personal information from or in respect of a data subject.'<sup>283</sup> Taking into consideration the argument above, there is a need to come up with a definition that will reflect the responsibilities and capabilities of those dealing with

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<sup>281</sup> It is essential to keep this in mind especially where initiatives governing C2C transactions are enacted.

<sup>282</sup> Please refer to the discussion on the right to be forgotten above.

<sup>283</sup> *Electronic Communications and Transactions Act* (South Africa) Section 1.

data.<sup>284</sup>

It is noted that the provisions provided for protection of personal information obtained through electronic transactions are not as comprehensive as similar provisions under the Australian NPP, the *OECD Guidelines for Consumer Protection in the Context of Electronic Commerce* and the *Canadian Code of Practice for Consumer Protection in Electronic Commerce*. However, the content of the provisions in the *Electronic Communications and Transactions Act* should be taken into consideration while working for Tanzania initiatives. The requirement of documented consents and transaction should be taken into consideration, however, the wordings should be modified so as to avoid uncertainties and limited initiatives.

### ***The Computer Misuse Act 2011***

Section 18 of the Act provides for unauthorised disclosure of information where it prohibits any person who has accessed electronic data, information or record to disclose such information to any other person.

The provision states ‘a person who has access to any electronic data, record, book, register, correspondence, information, document or any other material, shall not disclose to any other person or use for any other purpose other than that for which he or she obtained access.’ The only exception given is disclosure for the purposes of law. The Act goes further and establishes an offence and its punishment, which is a fine or imprisonment not exceeding ten years or both.

As the name of the Act suggests, the *Computer Misuse Act* was enacted to address the misuse of the computer and data system and cybercrime in general. The Act creates several computer offenses and establishes their punishments thereof. The Act was not aimed at addressing consumers’ concerns. It is evident it was aimed to curb cybercrimes through its stern provisions. The provisions do not give options of consent and other disclosure options given in consumer personal information provisions discussed earlier.

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<sup>284</sup> See also Kevin M Rogers, *The Law and the Internet* (Palgrave Macmillan, 2011) 215.

### 6.3 INITIATIVES ADDRESSING PROBLEMS ARISING IN PAYMENTS IN ONLINE CONSUMER TRANSACTIONS

#### **6.3.1 *Business to consumer (B2C) online transactions***

##### **(a) Involvement of Multiple Intermediaries**

Among features that surround Tanzania e-commerce is the involvement of multi-intermediaries in transaction payments, a necessity of the payment infrastructure available to e-consumers. In most cases, payments for e-transactions are made independently through a third party who does not represent the seller or the buyer; most commonly the mobile phone companies under their mobile phone money schemes.

Most of these mobile phone companies work independently of each other. Moreover, the services offered by these companies and most of the available payment intermediaries are not specifically designed for online commerce, but rather facilitate a general service for money transfers in the country. Hence, e-consumers payment concerns do not attract special interest from the service providers as they are only one category among many using their services. Consequently, e-consumers are faced with several uncertainties such as payment evidence which can be retrieved later in cases of dispute and uncertainty regarding their transaction rights,<sup>285</sup> as well as the doubling of costs due to receiving the same service from two different mobile phone service providers.<sup>286</sup> These uncertainties need to be addressed so as to protect e-consumers.

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<sup>285</sup> For further discussion on this, please refer to Chapter Three.

<sup>286</sup> This point is discussed further on extra and high transaction costs discussion below.

(i) Initiatives at the regional level

***OECD Guidelines for Consumer Protection in the Context of Electronic Commerce 1999***

OECD Guidelines address the issues of payments in consumer electronic transactions<sup>287</sup> by requiring consumers to be provided with easy-to-use and secure payment mechanisms. This is a positive initiative as it recognises the need for easy and secure payments for e-consumers. However, the provision is too general. It is uncertain what may be considered as easy and secure payments. Easy and secure payment systems may be objective or subjective. It may mean the possible available payments systems and technologies available. These may include systems that use different technologies such as the Electronic Data Interchange (EDI) and the Secure Electronic Transaction (SET) Protocol; characterised with the use of credit cards with embedded chips, magnetic strips and so forth.

It may also mean the choice of payment modes that consumers make such as making payments through mobile electronic fund transfers, wired money transfers and other money order facilities. All of these have implications when it comes to consumer protection and it is essential that they are specifically addressed. For instance, there is a need to warn consumers of the danger of making online transaction payments using wired money transfers and similar money orders as they are highly insecure and render little protection to e-consumers. Likewise, sellers should be discouraged from using such services. As far as the technology is concerned, this extends beyond the sellers' control; measures on electronic payment systems may need to be taken. However, at the consumer level, both sellers and consumers can be advised and guided on the right measures. It is essential that initiatives on e-consumer payment protection in Tanzania reflect these realities.

It is also noted that the Guidelines do not specifically address concerns arising from the involvement of multi-intermediaries.

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<sup>287</sup> Other international initiatives discussed in this work do not address the problems arising from electronic payments, in particular, that of intermediary involvement.



(ii) Initiatives at the national level

***Australian Guidelines for Electronic Commerce (March 2006)***

Guideline 32.4 provides that e-consumers should be provided with details of payment options. This guideline assists in making e-consumers aware of different payment options available in a particular transaction. However, due to its generality, it is unlikely to be an effective provision in addressing electronic payment concerns, especially those facing Tanzania e-consumers. The same can be said of Guideline 40.1, which provides that businesses should ensure that consumers have access to information on available payment methods.

The above guidelines hold more weight when read together with Guideline 39 which provides that businesses should provide payment mechanisms to consumers that are reliable, easy to use and has appropriate security. This provision is similar to the OECD Guidelines provision above, however, the additional wording makes it more specific. The provision has given specific directions by requiring a reliable payment mechanism and security appropriate to the transaction. However, this is not specific enough to address all concerns, and the decision as to what is reliable or appropriate security has been left to sellers; this creates uncertainty and varying standards in electronic transactions.

These guidelines can be used as a reference when addressing payment concerns in Tanzania. However, as noted, they are insufficient in addressing the issue of the involvement of intermediaries. Specific measures need to be identified to address these concerns.

***Canadian Code of Practice for Consumer Protection in Electronic Commerce 2004***

Principle 1.5(c) of the Code details the information which vendors should provide, including the methods of payment available to consumers and any associated surcharges or discounts. This provision is similar to the provisions discussed above, however as already noted, information alone will not effectively protect e-consumers

when they make payments for their online transactions; specific measures are needed to create certainty and uniformity. Also, the principle does not address issues of intermediary involvement.

### ***Electronic Communications and Transactions Act 2002***

Section 43(j) of the Act requires that consumers be provided with information on the manner of payment. This provision is similar to those discussed above except it is shorter and more general, that it is likely to be less effective. The provision simply requires vendors to provide consumers with information on the manner of payment. It does not provide the 'how' or 'when' such information shall be given. Concerns such as easy and secure payment mechanisms are not addressed; and like previous provisions, the issue of involvement of multi-intermediaries is not addressed.

All the above discussed provisions are significant in addressing payment concerns. Sellers should be required to opt for secure payments options available in the country. For instance, sellers should not use wired money transfers and other money order facilities such as Western Union which are unsecured. It is almost impossible to trace payment receivers through these systems. Sellers should also provide buyers with sufficient information regarding payments. This should include all necessary information from the payment options that the seller has selected to what to do in case of uncertainties regarding transactional payments. Information regarding refunds should also be included.

However, the provisions have not addressed the issue of the involvement of multi-intermediaries during the payment phase of electronic transactions. Specific rules and guidelines need to be set as far as payments of intermediaries are concerned. There should be a certain level of responsibility and liability of all parties involved in electronic transactions, including the payment intermediaries.

One of the measures that can be adopted is to make intermediaries directly responsible and liable where they violate consumer rights, and to hold them indirectly responsible and liable where they are in control and able to rectify consumer violations committed by sellers or receivers of payments. Payment intermediaries involved in electronic

transaction payments should have their obligations clearly set out and be required to render certain protection to consumers. They should be able offer assurance and certain levels of protection such as an assurance of protecting their money in case of lost or stolen accounts or login passwords, or in case of error payments, disputed payments, and protection against fraud, among others.

They should keep the consumers informed on the payment transactions, and provide consumers with records of the transactions and make them available for future reference, consumer should be given a chance to send information together with their payments for reference purposes for both themselves and the receivers, they should also receive confirmation of conclusion of such transactions and they should offer cancellations and refunds where it is possible and necessary to do so.

This may be where funds have not been processed or where funds have not been received; or where funds have been received but the transaction can be reversed or charged back. All this will render a certain degree of protection to e-consumers when they make payments through these intermediaries.

These rights should not be exclusive only to e-consumers but should be rendered to all consumers of these payment intermediaries. However, there is currently little and unsatisfactory protection of general consumers in Tanzania making it necessary to clearly set out the rules for e-consumers in order to have an effective protection system. Addressing the protection of general consumers who use the services of intermediaries is a significant issue and needs a separate platform.

Due to the independent nature of the payment facilitators in these transactions, one may easily argue that it is uncertain these payment facilitators will be able to offer e-consumers transaction rights, such as refunds and cancellations, when needed. Payment facilitators will not be concerned with refunds due to non-delivery and other disagreements, as theirs is a different transaction regardless of the outcomes of online transactions of the money sender and payee.

Also, facilitation of refunds may not be realistic due to different operating systems of mobile phone companies. As these companies are not working with any online

business, their facilities and priorities do not address online commerce payment needs.

However, all of these may be addressed through e-consumer initiatives. For instance, these initiatives may facilitate recognition of payments for e-transactions where e-consumers will be required to state the nature of payment when transferring payments for e-transactions; and similarly, payment intermediaries be required to offer certain care when payments are classified as e-transactions payments. There is no doubt that payment intermediaries are in a better position to render protection when it comes to payment concerns such as payment fraud and can render protection to those who use their services as they have control of the transaction. It is argued that intermediaries play an important role when it comes to government regulation in the public interest.<sup>288</sup> It is also argued that (payment) intermediaries can affect how the market operates;<sup>289</sup> that, ‘in the domain of commerce, an important component of the architecture is the presence of middlemen<sup>290</sup> ...Intermediaries are generally identifiable and accountable..., they are ideally suited to act as agents for the common good.’<sup>291</sup> Hence, they are an integral party in shaping a practise and delivering and achieving legitimate governmental ends.<sup>292</sup>

Furthermore, payment intermediaries can be encouraged to establish merchant services, where sellers are established as regular customers with trade accounts and specific benefits. This will benefit both buyers and sellers as they will have easy payment procedures and an established safe list of payments as payment intermediaries will easily be able to identify and block fraudsters.<sup>293</sup>

#### **(b) Extra and high transaction costs**

Among concerns that e-consumers in Tanzania face are high charges and transaction costs. This is seen mainly in the payment stage of the transactions; however, it is

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<sup>288</sup> Andrew L Shapiro, ‘Digital Middlemen and the Architecture of Electronic Commerce’ (1998) 24 *Ohio Northern University Law Review* 795, 801.

<sup>289</sup> *Ibid*, 802.

<sup>290</sup> *Ibid*.

<sup>291</sup> *Ibid* 802-3.

<sup>292</sup> *Ibid* 806.

<sup>293</sup> This initiative can only be encouraged by payment intermediaries and not imposed as it involves operational costs.

something that e-consumer face at almost all stages of an electronic transaction, from highly priced products, high shipping charges to high payment costs.

There are several reasons for such costs, for instance, imported products tend to be priced higher than they should be, and also the use of foreign currency raises the price higher than if they were listed under the local currency due to rate fluctuations. Moreover, high charges may be reflected through shipping costs which are mostly determined by individual sellers. A lack of reliable shipping infrastructures and well established postage services make it necessary for individuals to come up with private shipping arrangements and services. Due to the lack of uniformity and established regulations, prices and services offered differ from one service provider to another. This entices sellers and other service providers to estimate charges they deem fit; which may be higher for e-consumers.<sup>294</sup>

Moreover, the available payment methods in the country, especially the mobile phone money payments causes high and extra payment charges to e-consumers through service and handing fees. E-consumers sending money through these services have to pay a certain fee for sending and receiving the money, which may easily result in double charges. Similarly, e-consumers are likely to face double charges due to independent mobile phone service providers being involved in the same money transfer transaction.

(i) Initiatives at the regional level<sup>295</sup>

***OECD Guidelines for Consumer Protection in the Context of Electronic Commerce 1999***

Guideline III.C provides that businesses engaged in e-commerce should provide sufficient information about the terms, conditions and costs associated with a transaction to enable consumers to make an informed decision about whether to enter

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<sup>294</sup> Refer to Chapter Three.

<sup>295</sup> Only the *OECD Guidelines for Consumer Protection in the Context of Electronic Commerce 1999* has addressed the issue of additional and high transactional costs.

into the transaction. This guideline is relevant in addressing extra costs that e-consumers may face as by being provided with the information it is clear as to what payments will need to be met. This ensures that e-consumers are not met with hidden extra costs. However, the guideline does not address the issue of high charges. Requiring e-consumers be informed alone is not sufficient; it will not protect e-consumers from high charges and therefore this problem still needs to be addressed. There is a need for measures that will ensure sellers do not burden consumers with unnecessary, unreasonable and unfair charges.

Clear guidelines, uniformity and clear standards in fees charged for postage and similar services offered to e-consumers is needed to create certainty among e-consumers and help control unreasonable charges. Also, there is a need to regulate what needs to be charged so as to avoid double charges and unfair charges.

(ii) Initiatives at the national level

***Trade Practices Amendment (Australian Consumer Law) Act (No. 2) 2010***

Section 29 (1) (i) of the Act prohibits misleading representations with respect to the price of goods or services. This provision is significant in protecting against extra charges. This provision should be considered in Tanzania initiatives as misleading representations with respect to the price of goods are among the problems for which e-consumers need protection. Prices may be presented in lower value but consumers may have to pay extra or a higher value at the end of a transaction.

However, the wording of the provision should be qualified to include several scenarios that may be considered as misleading representations, this will assist consumers to be able to identify possible violations and sellers from making genuine mistakes. This may also curb other subtle situations that may not be easily labelled as misrepresentation. Moreover, the provision alone is not comprehensive enough to address all concerns of extra and high changes that e-consumers face. It should be considered together with other provisions.

Section 47 of the Act prohibits multiple pricing. This is a useful provision as it

addresses an issue which is likely to cause extra and high charges to consumers. According to the section, sellers are prohibited to list an item with multiple prices. When this happens sellers are prohibited to use the highest price listed, they have an option of either using the lowest price listed or relisting with one price. The shortcoming of this provision is that it does not at all address concerns of extra and high costs. However, it raises an important issue which needs to be addressed for Tanzania e-consumers.

This provision should be adopted for Tanzania initiatives as the element of prohibiting multiple listings is important in addressing high and extra charges concerns. Sellers who have made a genuine mistake should be given an opportunity to rectify multiple listing of prices, but at the same time ensuring that consumers do not suffer at the expense of sellers' mistake. This provision should be incorporated with other provisions to broaden the scope of on issues of high and extra charge.

#### ***Australian Guidelines for Electronic Commerce (March 2006)***

Guideline 31 requires all compulsory charges such as delivery, postage and handling charges to be included in the price. This is an important provision as it facilitates a true cost presentation to consumers and minimises the chance of unexpected costs later on. However, the words need to be framed with care when adopted for Tanzania initiatives to ensure they do not cause uncertainties. Whereas it is important for consumers to know the total price, it is also important that consumers are aware of the separate charges. This may help them make informed decisions and be able to identify high and unnecessary charges among other things. Consumers need to be well informed. This can be done by providing them with clear costs for each item. Guideline 31 requires a single figure presentation and does not state that consumers be provided with itemised cost breakdowns. Instead, the guideline states that the requirement of single figure pricing does not preclude a business itemising the total costs to the consumer collected by the business. The wording used in this provision means it is at the discretion of the seller to provide such itemised costs.

In order to achieve effective protection in Tanzania, it is essential that consumers are provided with both a single figure and breakdown cost of each item. This will provide

transparency and thus give an opportunity to e-consumers to make an informed choice and discourage the practice of high charges.

Moreover, there is a need to address charges that consumers are presented with and to ensure that sellers do not add extra charges in handling fees and postage. Unreasonable handling fees charges should be discouraged. There is also a need to set out what fees consumers are expected to pay during the payment process. The practice of charging consumers for payment services for the online transactions they have made needs to be discouraged. Sellers need to facilitate fee payment mechanisms that will not be costly to consumers and which are also easy and secure. There is also a need to regulate payment intermediaries' charges directed to consumers when making payments. In particular, the practise of double charging customers needs to be addressed.<sup>296</sup>

Guideline 31.1 is also useful in addressing Tanzania concerns. The guideline provides for situations where the total cost of a transaction cannot be worked out in advance, by requiring that consumers be informed in a statement that the total cost cannot be provided and be given a description of the method to be used to calculate the total costs, including any recurrent costs and the methods used to calculate those costs.

This requirement provides transparency and ensures the consumers are well informed as to the total costs they are going to incur. There should be a proviso to the effect that this statement is binding and sellers should not easily change the information at a later time. This ensures the provision is not misused by misinforming or misleading consumers by presenting them with lower estimates and hence attracting them to enter into a transaction.

Guideline 28 states that all information relating to costs should indicate the applicable currency, including guidance on how to get information on exchange rates, or a link to a site where such information may be found. This is one of the payment issues that the

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<sup>296</sup> Refer to Chapter Three where problems arising in payments for online consumer transactions are discussed.



Tanzania initiatives need to address.<sup>297</sup> The guideline highlights the solution that can be taken to address the matter. However, this alone is not enough to address Tanzania concerns. There is a need to ensure that consumers are trading under a local currency. Moreover, local transactions should be listed under a local currency and international transactions should have clear information on the applicable currency and its exchange rate with the local currency.

Furthermore, Guideline 40 provides that businesses should ensure that consumers have access to information on any costs applicable to the available payment methods, how best to use those methods, how to cancel regular payments under those methods, and information on any costs applicable to those payment methods. All of the provided guidelines are needed to address Tanzania's concerns. However, the Australian guidelines require information to be provided, however, this should not be the case for Tanzania. There is a need for more than just information to be offered. Actual protection should be rendered. For instance, there is a need to oversee the payment charges that consumers faces from both sellers and payment intermediaries. The element of cancelling of payments is also very important. Consumers need to be provided with this opportunity at no cost. Therefore, there is a need for Tanzania initiatives to provide e-consumers with specific rights and privileges in payments, and to also ensure that e-consumers are well informed of such rights and privileges.

### ***Canadian Code of Practice for Consumer Protection in Electronic Commerce 2004***

Principle 1.5 (b) requires that prior to the conclusion of transactions, vendors shall provide information of terms and conditions of sale related to the transactions, the full price, applicable currency, any shipping charges, taxes, and specific reference to any other charges that the vendor is responsible for collecting. The provision further requires that where the vendor cannot ascertain the amount of applicable charges they should inform consumers the fact that such charges may apply; and in cases where the full price cannot be worked out in advance, the method the vendor will use to calculate it, including any recurrent costs and the method used to calculate them.

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<sup>297</sup> Refer to Chapter Three on the discussion on the problem of using foreign currency, in particular the US Dollar in the Tanzanian local market.

This provision is similar to the provisions under the *Australian Guidelines for Electronic Commerce* in the previous discussion. The only difference is the wording used in the Canadian Code. The wording needs to be noted as they add extra weight to the provisions. The requirement that consumers should be informed on taxes and any other charges that the vendor is responsible for collecting is important so as to ensure that consumers are not surprised with hidden charges. It is also important that consumers are informed of the taxes involved and whether it will cost them extra later due to such charges.

Furthermore, Principle 1.5 (c) requires that payment terms, including the methods of payment available to consumers and any associated surcharges or discounts be communicated to consumers. This is also similar to the above discussion.

#### ***Electronic Communications and Transactions Act 2002(South Africa)***

Section 43.1 (i) requires consumers to be provided with information on the full price of the goods or services, including transport costs, taxes and any other fees or costs. This provision is similar to the Canadian principle discussed previously. The comments given above should be noted here.

#### **(c) Insecure payment systems**

Payment security is one of the important issues that need to be addressed for Tanzania e-consumers. E-consumers are faced with a lack of chargeback services and little guidance and security protection when making payments. E-consumers are also faced with little assistance when they experience payment fraud. All of these need to be addressed.

- (i) Initiatives at the regional level

***OECD Guidelines for Consumer Protection in the Context of Electronic Commerce 1999***

Guideline V states that consumers should be provided with easy-to-use, secure payment mechanisms and information on the level of security such mechanisms afford. The guideline also encourages that consumers be informed on limitations of liability for unauthorised or fraudulent use of payment systems, and use of chargeback mechanisms.

These requirements are essential in payments on online transactions and need to be incorporated under local initiatives. However, the guideline is general, requiring easy and secure payments mechanisms and information to consumers. There is a need for specifics and to set a standard of what should be provided by sellers to consumers. For instance, there is a need to specifically require sellers not to use unsecure payment mechanisms such as money transfer wires. In addition, there is a need to set a standard as to what should be provided as basic information on payment security. Information on security is vast and consumers may not be able to process all the information provided at a short time when they are required to make payments online. Hence, there is a need for clear, short and precise information that will give e-consumers the necessary information.

The guideline is useful as it encourages providing information on limitations of liability for unauthorised or fraudulent use of payment systems, and use of chargeback mechanisms. However, more efforts are needed under the Tanzanian scenario in this area as these limitations and liabilities have not been clearly set. Currently, there is no chargeback mechanism that is employed by the financial institutions and liabilities to e-consumer.<sup>298</sup>

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<sup>298</sup> Refer to the discussion in Chapter Three.

(ii) Initiatives at national level

***Australian Guidelines for Electronic Commerce (March 2006)***

Guidelines 40.2 - 40.4 provide that businesses should ensure that consumers have access to information on the security of payment methods in clear, simple language, so as to help consumers judge the risk in relying on those methods; how best to use those methods; and how to cancel regular payments under those methods. The requirement for the use of simple and clear language is an essential factor to be noted. However, as pointed above, there is a need for specific information to be offered to e-consumers, which reflects the nature of online transactions. E-consumers may not have enough time to review all the information at once, hence key issues need to be clearly addressed in a way that e-consumers can grasp and act on before concluding payment activities.

Furthermore, Guideline 41 provides that businesses should review the payment mechanisms they provide periodically to ensure they continue to offer a reliable, accessible and secure service. Similar to what was noted in Guideline 40, this provision is useful but needs to be specific. For instance, there is a need to list insecure and unsafe payment mechanisms to e-consumers so that they are aware of the risks.

Guideline 42.2 provides that businesses should provide security appropriate for protecting consumers' personal and payment information.

***The Computer Misuse Act 2011***

The Act does not address the issue of insecure payment systems for e-consumers.

The above discussion on different jurisdiction levels points out measures taken by different jurisdictions in addressing the issue of insecure payments. However, the measures available are not exhaustive and not likely to render full protection to Tanzanian e-consumers. There is a need to address the issue further and develop

strategies that may render more protection.

The problem of security in online transactions is massive and needs to be addressed at a different level. It is clear that sellers alone cannot protect e-consumers from security problems. However, they can play a significant role in reducing or even stopping the problem. Actions need to be taken not only by sellers but also financial institutions and individuals who engage in online transactions.

Among the strategies that can be employed is e-consumer education on the risks they face in payments for online transactions, and what they can do to enhance security to such transactions. E-consumers should be provided with adequate information regarding the payment details they give out and how they may be able to detect suspicious or unusual activities. Such information needs to be provided in short, clear, precise, noticeable form during the actual payment phase and additional information may be made available for e-consumers to retrieve and read at their own pace.

It is essential, wherever possible, for service providers to endorse their website pages by a certain logo or sign and make e-consumers aware when they are being directed to different webpages under different service providers. This can simply be done by warning e-consumers that they are leaving the secure pages of the website owner and have no association with the pages they are navigating to; the website owners may further alert e-consumers by requiring them to click a button before leaving the secure pages.

Furthermore, financial institutions should offer a certain amount of protection to its customers, such as making them aware when their account have been overdrawn, this can be through emailing or messaging them. Furthermore, financial institutions should also be able to respond quickly to e-consumer fraud alerts and be able to assist them to get out of the situation. For instance, the financial institutions should be able to temporally stop account activities when they receive a request from e-consumers, and delay any money transfers or payments where e-consumers declare that they have not authorised them. Furthermore, chargeback facilities and other similar security facilities should be rendered to consumers when needed.

E-consumers should also be provided with a venue where they can easily and quickly take their complaints or problems. This should be a consumer watchdog ready to address all possible violations that consumers face and with the ability to act quickly, especially in payment frauds and other payment security issues. Such a venue can provide quality guidance to e-consumers who may feel uncertain about the necessary steps required to resolve their problems.

#### 6.4 INITIATIVES ADDRESSING DISPUTE RESOLUTION FOR ELECTRONIC CONSUMER TRANSACTIONS

Availability and accessibility of dispute resolution systems are crucial elements in consumer protection. The dispute resolution mechanism available in Tanzania does not satisfactorily provide for the need of Tanzanian e-consumers. It does not offer an easy or effective legal infrastructure to deal with disputes arising in online transactions.<sup>299</sup> There is a lack of clear laws and systems addressing online dispute resolution.<sup>300</sup> Consequently, issues such as how to deal with cross border online disputes, how to deal with local online consumer disputes, legal aid for e-consumers, ousting clauses in e-transactions, and enforceability of judgements or decisions of online disputes are not addressed. There are other concerns which both online and offline consumers face, such as high costs for seeking redress, the presence of bureaucratic procedures to seek redress in offline transactions, a lack of an effective non-governmental consumer body to represent the interests of consumers, and insufficient consumer education. There is a need to address these issues for both offline and online e-consumers. However, an emphasis on addressing these issues specifically for e-consumers is recommended in order to ensure effective e-consumer protection.

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<sup>299</sup> Refer to the discussion in Chapter Three.

<sup>300</sup> The importance of specific online dispute resolution is further clarified under the subsequent discussion below.

### 6.4.1 Business to consumer (B2C) online transactions

#### (a) Introduction

One clear fact is that consumer disputes are closely related to the contractual relationship. As this is the agreement they enter into with sellers and service providers when they agree to receive goods or services from them. However, these contracts have unique characteristics in that one party has more bargaining power than the other; one party is at a disadvantage. Moreover, it is argued that disagreements on these contracts not only create a problem between the parties to those contracts but also can create difficulties with more far-reaching social impact.<sup>301</sup> There is a need for clear effective and efficient measures to address e-consumer disputes that goes beyond the available principles, such as the principles of contract law.

The available measures at international level do not address e-consumer concerns. It has been stated that ‘the legal framework for the making and enforcement of international contracts for the sale of goods is substantially constructed for commercial contracts (B2B) rather than consumer transactions (B2C).’<sup>302</sup>

The dominance of commercial contracts extends to the area of dispute settlement where ‘the major legal tool for development of online consumer dispute resolution has been through contract.’<sup>303</sup> This is carried out by imposing dispute resolution provisions on consumers’ terms and conditions of sale.<sup>304</sup> This is detrimental to consumers as in most scenarios these conditions are imposed on consumers who have no choice other than to accept them, and are most likely to favour the sellers.<sup>305</sup> This is likely to hinder any dispute claims especially where consumers are faced with arbitration clauses or terms and conditions requiring them to pursue matters in a particular jurisdiction or forum. This scenario can be seen in the case of *Standard*

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<sup>301</sup> Paul O’Shea and Charles Rickett, ‘In Defence of Consumer Law: The Resolution of Consumer Disputes In Defence of Consumer Law: The Resolution of Consumer Disputes’ (2006) 28 *Sydney Law Review* 139 <[http://sydney.edu.au/law/slr/slr28\\_1/Rickett.pdf](http://sydney.edu.au/law/slr/slr28_1/Rickett.pdf)>.

<sup>302</sup> Mary E Hiscock, ‘Cross-Border Online Consumer Dispute Resolution’ (2011) 4 *Contemporary Asia Arbitration Journal* 1, 4.

<sup>303</sup> *Ibid* 9.

<sup>304</sup> *Ibid*.

<sup>305</sup> Cristina Coteanu, *Cyber Consumer Law and Unfair Trading Practices* (Ashgate Publishing, 2<sup>nd</sup> ed, 2005) 88.

*Bank London Ltd v Apostolakis*<sup>306</sup> where the bank tried to stop the defendants, residents in Greece from filing any claims against the bank in Greece as they had agreed to the terms of the bank and agreed to submit any claims under the contract to the exclusive jurisdiction of the English court. It was held that the jurisdiction agreement was an unfair contract term pursuant to the provisions of the Brussels Convention and also in the light of Unfair Terms in Consumer Contract Regulations 1994 and 1999.<sup>307</sup>

It is evident that with the use of commercial contractual agreements, e-consumers will always be faced with obstacles when aggrieved. They will have to contest their right to seek remedy first before presenting their ailments to the appropriate body. There are jurisdictions which are proactive in protecting e-consumers against such situations through case law.<sup>308</sup> However, other jurisdictions such as Tanzania lack such protection for its consumers and hence the need to have consumer specific laws addressing e-consumer dispute concerns.

The available measures in Tanzania do not effectively and efficiently address concerns that e-consumers and m-consumers face when aggrieved. There are initiatives on telecommunication services in Tanzania,<sup>309</sup> however, these are not sufficient and do not effectively address concerns of e-consumers and m-consumers. The available consumer protection provisions from the *Fair Competition Act, 2003*<sup>310</sup> also address some general consumer concerns but they do not cover a lot of e-consumer concerns raised in this thesis. The general provisions which may deal with similar issues facing e-consumers; as pointed out in the previous discussion, are more likely to cause uncertainty when applied to the online world.

There are also uncertainties when trying to adjudicate cross border online transactions. This is clearly seen in the case of *LICRA & French Union of Jewish Students v Yahoo!*

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<sup>306</sup> [2001] EWHC 493 (Comm) (9 February 2001).

<sup>307</sup> Ibid.

<sup>308</sup> In *Elisa Maria Mostaza Claro v Centro Movil Milenium SL* (C-168/05) [2006] ECR I-10421 the European Court of Justice provided that even where there was no objection to the unfairness of the arbitration clause during the proceedings, the court should raise the issue by its own motion.

<sup>309</sup> Please refer to the discussion in Chapter Five.

<sup>310</sup> (Cap 285 R.E. 2002).



*Inc, Yahoo France*<sup>311</sup> which has become known as a landmark case 'of the difficulty to apply national laws to a global medium such as the Internet.'<sup>312</sup>

Other jurisdictions have taken several initiatives to address problems arising in 'post formation' of e-consumer and m-consumers transactions. These initiatives will be discussed below.

It is noted that in this part of the discussion separation between two concepts of e-consumers and m-consumers is presented. This is in recognition that some of the dispute issues need to be addressed and resolved through mobile phone service capacity and through the mobile service providers. The integration of these two transactions will still be recognised and measures recommended will reflect this.

## **(b) Concerning Issues**

### **(i) Accessibility**

#### **Absence of Laws, Legal Infrastructure and Ousting Clauses**

The absence of sufficient laws to adjudicate e-consumer and m-consumer concerns is a major element in the accessibility of justice. The level of such absence differs in different jurisdictions, for instance there are situations such as in Tanzania where there is absence of specific laws recognising electronic transactions in general, and a lack of precedents in the area; which consequently deny e-consumers' access to justice. There are also situations where laws are available, however, they are insufficient in addressing e-consumer dispute resolution concerns and cross border issues.<sup>313</sup>

Furthermore, the presence of laws can easily be compromised by the presence of

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<sup>311</sup> European Commission, *Legal Analysis of a Single Market for the Information Society* (SMART 2007/0037, 2009)

<[http://ec.europa.eu/information\\_society/newsroom/cf/dae/itemdetail.cfm?item\\_id=7022](http://ec.europa.eu/information_society/newsroom/cf/dae/itemdetail.cfm?item_id=7022)>.

<sup>312</sup> Ibid.

<sup>313</sup> See Hiscock, above n 302.

ousting clauses. E-consumers and m-consumers may find themselves unable to access justice as a result of such clauses.<sup>314</sup>

Similarly, a legal infrastructure is another major element facilitating access of justice. E-consumers can easily be denied their rights due to lack of proper legal infrastructure where they can have their concerns heard. Expensive court procedures, lack of legal presentation, and lack of local court venues can all lead to lack of legal infrastructures.<sup>315</sup>

There are several jurisdictions that have addressed the issue of access to justice. These will be examined below.

(ii) Initiatives at the global level

***UNCITRAL Model Law on Electronic Commerce (1996)***

The Model law provide for several provisions guiding electronic transactions between parties. However, the Model law does not provide for venues in case of disputes between parties. There are no specific provisions setting out guidance in case where parties are aggrieved. This may be due to the fact that the Model law sets out guidance principles to be followed by its member states. However, there are international transactions where more than one member state may be involved and this international element needs to be regulated in order to bring access to justice for e-consumers and m-consumers involved.

There are several dispute resolution instruments provided by the United Nations under UNCITRAL. These includes *UNCITRAL Committee Arbitration Rules*,<sup>316</sup>*UNCITRAL*

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<sup>314</sup> Such as discussed in *Standard Bank London Ltd v Apostolakis & Another* [2001] EWHC 493 (Comm) (9 February 2001) and *Elisa Maria Mostaza Claro v Centro Movil Milenium SL* (C-168/05) [2006] ECR I-10421.

<sup>315</sup> For the discussion on lack of legal infrastructure in Tanzania refer to Chapter Three.

<sup>316</sup> International Institute for the Unification of Private Law (UNIDROIT), *Principles of International Commercial Contracts* 2004 *UNCITRAL Arbitration Rules*, 31 UN GAOR Supp No 17, UN Doc A/31/17 (1976).

*Conciliation Rules*,<sup>317</sup> recommendations to assist arbitral tribunals and other interested bodies with regard to arbitrations under the *UNCITRAL Arbitration Rules*, *UNCITRAL Model Law on International Commercial Arbitration*,<sup>318</sup> *UNCITRAL Notes on Organizing Arbitral Proceedings*<sup>319</sup> and *UNCITRAL Model Law on International Commercial Conciliation*.<sup>320</sup> However, none of these addressed dispute resolution concerns in e-commerce or m-commerce. It is stressed here that, similar to the available national laws, these instruments were enacted without e-commerce or m-commerce in mind. Hence, the principles set out are most likely to be ineffective in addressing new concerns arising in the electronic arena.

This gap was realised by UNCITRAL and it is currently working on procedural rules for ODR, efforts which started in 2010 under the UN Working Group for ODR of cross border electronic commerce transactions (UNCITRAL Working Group III).<sup>321</sup> The last meeting of the UNCITRAL Working Group III was its thirtieth session in Vienna, 20-24 October 2014.<sup>322</sup> This work will not be extensively discussed, as it is still work in progress. However, it is worthwhile to briefly point out the expected outcome. The existence of work in progress on these rules is a positive effort, as the presence of these rules will provide access to justice for e-consumers when aggrieved. It is expected that these rules will provide enabling provisions that will ensure that e-consumers are able access to justice. Even though the rules are still a work in progress, some scholars are of the view that these rules will not work for consumers.<sup>323</sup>

There is a view that the current approach taken by the UNCITRAL Working Group III is too narrow and its proposed rules will be ineffective, especially for the intended

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<sup>317</sup> 35 UN GAOR Supp No 17, UN Doc A/35/17 (1980).

<sup>318</sup> GA Res 40/72, 40<sup>th</sup> sess, 112<sup>th</sup> plen mtg, UN Doc A/RES/40/72 (11 December 1985, adopted 21 June 1985).

<sup>319</sup> 29<sup>th</sup> sess, 28 May – 14 June 1996, A/CN.9/423 (reproduced in UNCITRAL Yearbook, vol. XXVII, 1996, part two).

<sup>320</sup> GA Res 57/18, 57<sup>th</sup> sess, Agenda Item 155, UN Doc A/RES/57/18 (24 January 2003, adopted 24 June 2002).

<sup>321</sup> The ODR framework includes procedural rules, substantive rules, standards for ODR providers and an enforcement protocol. However the current work is on procedural rules.

<sup>322</sup> See UNCITRAL Working Group III (Online Dispute Resolution), above n 6.

<sup>323</sup> Michael Erdle, 'Will UNCITRAL Online Dispute Resolution Rules Work for Consumers?', *Slaw* (online), 4 December 2012 <<http://www.slw.ca/2012/12/04/will-uncitral-online-dispute-resolution-rules-work-for-consumers/>>; Andrea Schneider et al, *Vikki Rogers on UNCITRAL's Working Group III on Online Dispute Resolution* (July 2012) Mediate <<http://www.mediate.com/articles/GrossJbl20120730.cfm>>.

recipients, which include the low-value straightforward online transactions.<sup>324</sup> There is a view that the UNCITRAL Working Group III's approach ignores some of the existing models of addressing disputes arising from low value e-commerce transactions such as the credit card chargeback system and the PayPal ODR process.<sup>325</sup>

It is pointed out that the Working Group's approach departs from established and effective dispute systems in that the dispute resolution system will operate entirely outside the transaction, and instead will sit outside the independent payment channels. Consequently, both sellers and buyers will need to be made aware of it, sellers will have to voluntarily sign up, and buyers will be forced to bind themselves to it at the time of the transaction. It is pointed out that there is little incentive for sellers to participate or penalties for refusing to do so. Furthermore, the independent system will not have the power to enforce decisions, so in case of a seller's refusal to comply, the buyer must go to seller's jurisdiction and seek to have the award enforced in local court.<sup>326</sup>

Furthermore, it is of the view that the system will not be centralised within a few payment providers but decentralised amongst ODR providers, making it difficult to track scheming or fraudulent sellers and buyers. Moreover, because of the system, consumers are likely to lose their right to seek redress in court and hence will be denied their right to court intervention and review regarding the substance of the matter.<sup>327</sup>

It is pointed out that this approach is different from the current available system where sellers that use a payment system are required to use its dispute resolution system; and therefore, sellers are bound to the dispute resolution process, without binding the buyer. The dispute resolution system is part of the payment process, so consumers are aware of and can easily access them. Recourse is available within the payment system, so enforcement is simple and parties still have recourse to the courts. Furthermore, fees charged to sellers fund the system, and therefore it encourages settlement.

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<sup>324</sup> Ibid.

<sup>325</sup> Ibid.

<sup>326</sup> Ibid.

<sup>327</sup> Ibid.

Moreover, payment processors can aggregate information and track cases against sellers to detect fraudulent practices.<sup>328</sup>

There is also the view that the rules proposed by the Working Group take the approach of alternative dispute resolution (ADR) processes that are intended for complex and/or B2B commercial disputes. This is not only a complex system to be followed but may also compromise the substantive rules phase of rulemaking as it will be hard to agree that decisions should be made on an equitable basis or on a few basic general principles, when on the procedural side, there was a reliance on a complex body of law.<sup>329</sup> Moreover, local mechanisms for judicial enforcement of arbitration awards are expensive and time-consuming.<sup>330</sup>

Furthermore, there is scepticism that these rules will not be sufficient in addressing issues arising from the developing/third world and those facing post-conflict situations.<sup>331</sup> It has been argued that in order for the rules to respond to the ‘needs of developing countries and those facing post-conflict situations, in particular with regard to the need for an arbitration phase to be part of the process’<sup>332</sup> there is a need to ensure that the rules ‘enable micro and small businesses to effectively reach international markets through electronic and mobile commerce, recognize that traditional judicial mechanisms are not an option for resolving cross-border e-commerce disputes; provide a clear and simple process that includes online arbitration of disputes so that sellers cannot avoid their responsibilities to dissatisfied buyers.’<sup>333</sup>

It is contended that the rules proposed by the committee requiring private ODR entities to apply different rules known as the Track I and Track II ODR systems which are determined according to the basis of nationality, is commercially impractical.<sup>334</sup> It

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<sup>328</sup> Ibid.

<sup>329</sup> Ibid.

<sup>330</sup> Ibid.

<sup>331</sup> UNCITRAL, ‘A/CN.9/817 - Online Dispute Resolution for Cross-Border Electronic Commerce Transactions: Proposal by the Governments of Colombia, Kenya, Honduras and the United States of America’ (47<sup>th</sup> session, New York, 7-18 July 2014)  
<<http://www.uncitral.org/uncitral/commission/sessions/47th.html>>.

<sup>332</sup> Ibid 2.

<sup>333</sup> Ibid.

<sup>334</sup> In the two tracks ODR system parties will have to select between a system which includes negotiation, facilitated settlement and arbitration phases, or another system which does not include an arbitration phase. See UNCITRAL, above n 331.

is further claimed that 'it would be very difficult for e-commerce merchants and marketplaces to track consumers and transactions on the basis of nationality and legal jurisdiction at the outset of a transaction' and this is highly likely to lead to losing customers.<sup>335</sup> Moreover, there is a need to ensure that the rules are not given extraterritorial effects to domestic laws of a certain regional group as this would operate as trade restrictions and thus prohibit the effective operation of the ODR system for parties in other countries.<sup>336</sup>

As pointed out, these rules are still a work in progress; however, the views mentioned highlight the need to keep in mind a simple, easy, fast and affordable dispute resolution system to deal with e-consumer disputes. As pointed out by one scholar,<sup>337</sup> it may be true that in most cases, the only practical way for consumers to enforce mediated settlements or arbitration awards in their favour is to have access to a hassle-free refund of their money. Perhaps this should be considered when trying to resolve e-consumer disputes, however, there is a fine line between a successful dispute settlement and the danger of creating a different problem and ending up with a dysfunctional e-market place where this approach is concerned. This is even so in societies such as Tanzania where most of the sellers are small-scale businesses who are also vulnerable as in most cases they buy their commodities as consumers themselves. It is important to ensure that e-commerce continues to thrive and that the interests of both parties are being served. Moreover, such an approach is likely to have negative effect for e-consumers who may be sellers in C2C transactions.

It is important that the rules and any other efforts in dispute resolution should take into consideration the social and cultural aspects of the consumers, especially when these rules are implemented at a local/national level. This is because the manner and way people accept dispute settlement is highly affected by the cultural and social practises of those people.<sup>338</sup> Consumers, particularly in Tanzania, are likely to

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<sup>335</sup> UNCITRAL, above n 331, 3.

<sup>336</sup> Ibid.

<sup>337</sup> Erdle, above n 323.

<sup>338</sup> Claude-Hélène Mayer, Christian Bonness and Lynette Louw, 'The Impact of Value-Orientations on Cross-cultural Encounters and Mediation: A Survey in Tanzania's Educational System' (2008) 8 *African Journal on Conflict Resolution* 39 <<http://www.ajol.info/index.php/ajcr/article/view/39420>>; Walter Wright, *Cultural Issues in Mediation: A Practical Guide to Individualist and Collectivist Paradigms* (January 2000) <<http://mediationinstitute.webs.com/mediation.0911.pdf>>.

evaluate the sacrifice they are making in pursuing a dispute. Whereas the sacrifice of time, money and effort are the usual factors consumers may take into consideration before deciding whether it is worthwhile pursuing their claims, in communities such as those in Tanzania the evaluation goes beyond this. This is because these societies are integrated with a communal sense of belonging; where sellers and buyers exist in strong bonds of distance family relations; where they live through the spirit of Ubuntu (known as Utu in Swahili) and comradeship. There is likelihood of little utilisation of the dispute resolutions efforts put in place if they do not conform to social and cultural norms and morals, or if they disrupt the social and family bond or utu spirit in any form. As a result, there will be a failure in the consumer system, possibly leading to a dysfunctional market.

(iii) Initiatives at the regional level

### ***OECD Guidelines for Consumer Protection in the Context of Electronic Commerce 1999***

The OECD guidelines address the issue of access to justice by addressing the issues of jurisdiction and redress at chapter six of the guidelines. Part A of the Guidelines provides for applicable law and jurisdiction where the guidelines advise to ensure that there is a dispute resolution framework which provides fairness to consumers and business, facilitates e-commerce, results in consumers having a level of protection not less than that afforded in other forms of commerce, and provides consumers with meaningful access to fair and timely dispute resolution and redress without undue cost or burden.

This is useful guidance which facilitates the availability of adjudicating laws for e-consumers, however, it is a general guideline and does not set the standard for the laws and rules that can be followed. Countries are still left to set up laws that will facilitate dispute resolution.

The Guidelines continue to provide for redress under part B where it facilitates ADR and redress. They encourage businesses, consumer representatives and governments

to work together to continue to use and develop fair, effective and transparent self-regulatory and other policies and procedures, including ADR mechanisms to address consumer complaints and resolve consumer disputes arising from B2C e-commerce, with special attention to cross border transactions.

Having realised a significant legal and practical impediments to adequately resolving consumer disputes with cross border elements, the OECD Committee on Consumer Policy (CCP) came up with recommendations on consumer dispute resolution and redress.<sup>339</sup>

These recommendations set out principles for an effective and comprehensive dispute resolution and redress system that is also applicable to domestic and cross border disputes. In the recommendations, a framework for dispute resolution has been placed on different categories, including dispute resolution and redress mechanisms for consumers acting individually, collectively and for the cross border transactions.

With regard to dispute resolution and redress mechanisms for consumers acting individually, CCP encouraged countries to ensure that consumers have access to dispute resolution mechanisms and be able to obtain redress.<sup>340</sup> This is a positive effort in ensuring access to justice. The challenge that is not addressed here is the manner or methods these dispute resolution and redress mechanism should be. As pointed out earlier, a specific mechanism is required for consumers' dispute resolution and redress as the available court systems are not efficient in offering effective access to justice.

CCP further recommend that these mechanisms should be sufficiently accessible and easy to use to enable consumers to elect to conduct the procedure without need for legal representation or assistance as far as possible; and should not impose a cost on consumers that is disproportionate to the value of the claim at stake.<sup>341</sup> These are also positive recommendations that encourage access to justice; however; these need to be modified before applying them to the Tanzanian environment in order to achieve

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<sup>339</sup> OECD, *OECD Recommendation on Consumer Dispute Resolution and Redress* (2007) <<http://www.oecd.org/sti/consumer/38960101.pdf>>.

<sup>340</sup> Ibid Part II.A.2,3.

<sup>341</sup> Ibid Part II.A.5.



positive results. For instance, imposing a cost on consumers that is proportionate to the value of the claim at stake may still be a burden to e-consumers, particularly where the transaction is a cross border transaction.

Moreover, expenses in seeking redress are among the reasons that consumers select not to pursue matters further. In order to ensure access to justice in Tanzania, e-consumers should be able to present their concerns without being further burdened by extra expenses. E-consumers in Tanzania should also be provided with free representation when seeking redress. The government should come up with a mechanism to easily and accessibly represent e-consumers with a grievance..

CCP also recommends that the mechanisms to be established should be designed so that consumers are able to utilise them with only minimal additional information or help, such as through the use of standard forms to facilitate the submission of necessary documents.<sup>342</sup> This is an important element in facilitating access to justice. One of the reasons the current consumer protection system in Tanzania is not efficient is due to the bureaucratic process which consumers must follow when filing a complaint.<sup>343</sup> It is important that this problem is rectified when addressing e-consumers' access to justice. The efforts to be taken here should go beyond those recommended by the OECD Committee as such methods have proved less effective in Tanzania. E-consumers should be allowed to submit information in as simple a form as possible, this may include straightforward narration of the problem and scanned and photocopied documents they rely on if available. E-consumers should also receive assistance on how they should represent their problems so as to bring clarity and transparency to the whole process. However, they should not be bound by specific procedural methods such as filing particular forms and submitting particular documents. Simplicity, clarity and transparency should be the key.

CCP further recommends that the special needs of disadvantaged or vulnerable consumers should be considered so that they, or their representatives, can access these mechanisms.<sup>344</sup> This is yet another important recommendation that should be

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<sup>342</sup> Ibid.

<sup>343</sup> Refer to discussion on Available Laws in Tanzania in Chapter Five.

<sup>344</sup> OECD, above n 339, Part II.A.6.

considered for Tanzania initiatives. An important aspect to note here is who is a disadvantaged and vulnerable consumer? According to the recommendations, the ‘disadvantaged or vulnerable consumers’ refer to particular consumers or categories of consumers, who because of personal characteristics or circumstances (such as age, mental or physical capacity, education, income, language or remote location) may meet particular difficulties in accessing dispute resolution and redress.<sup>345</sup>

It should be noted that these categories shown in the example above cover the majority of Tanzania e-consumers, a large number being economically disadvantaged. This is further pronounced when e-consumers in underdeveloped countries deal with businesses in developed countries. The majority of e-consumers will qualify as disadvantaged consumers, however, such categorisation is not necessary as there is a danger of setting different standards for the advantaged and disadvantaged consumers. Instead, efforts should be taken to consider the reality of economic and social conditions of Tanzania e-consumers.

The recommendations also address on the mechanisms for consumer protection enforcement authorities to obtain or facilitate redress on behalf of consumers; where member countries are encouraged to work towards ensuring that consumer protection enforcement authorities have the ability to take action and obtain or facilitate redress for consumers, including monetary redress.<sup>346</sup> They also encourage these protection enforcement authorities to work together with other enforcement entities, such as private consumer organisations. This is a valid recommendation that should be adopted by Tanzania initiatives. It is important that e-consumers and m-consumers are represented as they have little capacity to fully and satisfactorily represent themselves. This also highlights the need for private e-consumer and m-consumer authorities which is currently not satisfactory in Tanzania. Among the initiatives the government can take is to promote such private groups, by assisting them to set up and link in with other private initiatives in other countries. However, it is vital that these organisations remain independent of the government. The extent of government involvement should not go beyond initiating and assisting in building up these groups.<sup>347</sup>

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<sup>345</sup> Ibid, Part 1.

<sup>346</sup> Ibid Part II.C.

<sup>347</sup> For further discussion on private consumer groups in Tanzania please refer to Chapter Five.

CPP also recommends member countries improve awareness and access to dispute resolution and redress mechanisms for cross border transactions and to enhance the effectiveness of consumer remedies in cross border disputes.<sup>348</sup>

Member countries are encouraged to participate in international and regional consumer complaints, advice and referral networks and provide clear information on judicial and extra-judicial dispute resolution and redress mechanisms available within their countries. This is one important step towards ensuring access to justice that Tanzania needs to establish. Tanzania needs to establish systems that will be effective in addressing cross border disputes. There is also a need to work with other consumer protection organisations and networks across borders. For this initiative to work effectively in the country there should be a full representation of e-consumers and m-consumers where authorities would contact and initiate dialog to other authorities or business across borders on behalf of the e-consumers and m-consumers.

CCP also recommends that member countries should encourage businesses and industry groups to provide consumers with voluntary mechanisms of dispute resolution.<sup>349</sup> This is to be done informally, and at the earliest possible stages. This recommendation is important in enhancing e-consumers' access to justice. It is important that e-consumers are availed with immediate means of resolution when aggrieved. In order to be effective in Tanzania this recommendation should be extended further to fit Tanzania e-consumer needs. Specific guidelines should be given to sellers on such redress mechanisms to create acceptable standards and uniformity in the area so that e-consumers are aware of what to expect. This should be a general standard and businesses can be encouraged to offer further input so as to serve the interests of e-consumers better.

This is necessary as the current consumer protection situation in Tanzania reveals that general provisions requiring the presence of certain services is not sufficient as the stakeholders are likely to come up with their own initiatives; initiatives which do not

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<sup>348</sup> Ibid Part III.

<sup>349</sup> Ibid Part IV.

necessarily benefit the consumer.<sup>350</sup> Moreover, the mechanism should not only be informal and free, but should also be voluntary. E-consumers should be able to choose the dispute resolution mechanisms they wish to engage in and which they believe will be beneficial to them. This is another a crucial element for the success of the mechanisms as the current practise requiring consumers to resolve the matters with businesses and service providers first before seeking further assistance has proved to be detrimental in accessing justice.<sup>351</sup>

Among the recommendations from CCP on building redress mechanisms were to engage private third party alternative dispute resolution services, by which businesses establish, finance, or run out-of-court consensual processes or adjudicative processes to resolve disputes between that business and consumers, and engage protections for payment cardholders in disputes with merchants, whereby payment card issuers must provide consumers with remedies for disputes arising from transactions for goods or services.

As with previous recommendations, these are vital for the Tanzania e-consumer, however, they can only be sufficient if adopted in a manner that reflects the culture and practise of the intended community. First and foremost, there is a need for mechanisms that are independent and free from business involvement, therefore, third party initiatives established or supported by businesses are not suitable initiatives to offer redress to e-consumers. It is not only important to build confidence and trust among e-consumers, but to also ensure there are no power dependencies and imbalances in the established redress mechanisms.<sup>352</sup> The exception to this would be where the service providers are only providing a venue where business and consumers meet to transact; and hence the service provider can be impartial.<sup>353</sup> However, even this needs a strong service provider who does not depend on businesses to strive.

Similarly, card payment protection needs to conform to and reflect the practice in the country. There is a need to incorporate a provision that will include protection of not

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<sup>350</sup> For further discussion refer to Chapter Five.

<sup>351</sup> For further discussion refer to Chapter Five.

<sup>352</sup> This is also why there is a need for a body to solely represent the interests of the consumers. The current system where one body represents both businesses and consumers seems to have unsatisfactory results in safeguarding consumers' affairs.

<sup>353</sup> An example of this may be the way PayPal operate.

only card payments but also the available mobile phone payment systems. There is a need to address protection on mobile payments systems, not only on the protection service providers can offer but from the government policy level. There should be identified services for commercial transactions payments, where service providers are required to offer protection in case of dispute and fraud.

If adopted and implemented, these recommendations will address the issue of access to justice as far as issues of enabling laws and legal infrastructures are concerned. However, the CCP has not addressed the issue of ousting clauses. It is important that Tanzania initiatives ensure such clauses are avoided or carefully construed in order to facilitate access to justice for Tanzania e-consumers and ensure full protection.

(iv) Initiatives at the national level

***Canadian Code of Practice for Consumer Protection in Electronic Commerce 2004***

The Code has addressed the issue of dispute resolution where it requires vendors to provide consumers with access to fair, timely and effective means to resolve problems with any transaction.<sup>354</sup> This recommendation seems similar to that of the OECD discussed above; however, the Code provides further related principles setting more value and conditions to this requirement resulting into a sufficient and wide address of the matter.

The Code requires vendors to offer an internal complaints-handling process that is easily accessible online and offline; is available to consumers free of charge; and is easy to use.<sup>355</sup> Furthermore, it requires these internal mechanisms to acknowledge complaints within seven business days of receipt, and to endeavour to resolve or address these complaints within 45 days of acknowledgment, and to record and monitor complaints.<sup>356</sup> This provision is essential for e-consumer protection in Tanzania. These requirements are necessary for Tanzania, particularly for the complaint handling mechanism to be available both online and offline as in Tanzania,

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<sup>354</sup> Principal 6.

<sup>355</sup> Principal 6.2.

<sup>356</sup> Ibid.

e-consumers may not have continual internet access, or they may have to pay high fees to access one. In addition, technological factors such as the slow internet speed and bandwidth, and power outages may easily discourage e-consumers from spending more time online than necessary. Therefore, the availability of such services offline will encourage more e-consumer participation and build greater trust and confidence.

The requirement of acknowledging complaints and responding within specific times is also very important for Tanzania. Not only do e-consumers need to know that the complaint handling mechanism is sound and their complaints will be considered in a timely manner, but there is also a need of confirmation that their complaints have been successfully lodged. One of the reasons for acknowledging the lodgement of complaints is the unreliability of technology. Due to slow and poor connections, it is easy to lodge complaints unsuccessful and not to be aware of that fact. Therefore, it is essential that e-consumers receive an acknowledgement of their lodged complaint. However, the provision needs to be modified to require less time for online confirmation. Businesses are expected to be equipped with fast and easy services, and are available online every day; it is unnecessary for them to take seven days to send a simple communication of acknowledgement. The adopted provision should also include offline confirmation, which should be delivered in reasonable time for such communications. In local transactions, it may be within seven days. Offline confirmation is necessary in case e-consumers cannot access internet for one reason or another.

Similarly, the requirement for resolving or addressing the complaints within a specific time is vital, although 45 days may not be suitable for all e-consumer complaints. Particularly in cases where the products in question are perishable; expire after a certain time; or involve high storage expenses while awaiting a resolution.

The Code further provides that when a consumer and vendor cannot resolve a complaint, the vendor is strongly encouraged to refer matters to an appropriate third-party dispute resolution service, the use of which shall be at the consumer's discretion.<sup>357</sup> This is an important provision and is recommended for Tanzania initiatives, however, as pointed out in the discussion on OECD recommendations;

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<sup>357</sup> Principal 6.3.

there is a need for an independent third party dispute resolution service. This is also expressed through the Code.

The Code is more extensive on the third party dispute resolution services than other provisions discussed above. According to the Code,<sup>358</sup> any third party dispute resolution mechanism offered by the vendor needs to be available online, irrespective of the consumers' location; be easily accessible to consumers such as via a hyperlink from the vendor's website; be easy to use; be offered at a nominal or no cost to consumers; be expeditious, with reasonable time limits for each stage of the process; be fair such as by meeting the standards of due process; and need to commit vendors to abide by the awards when consumers agree to them.

The Code also requires the third party mechanism to be transparent in all aspects of its operations, including services, procedures, governance structure, dispute resolution personnel, and the results of dispute resolutions. The dispute resolution service provider is also required to make public its arbitration case results and detailed statistics on the number and type of complaints and the proportion resolved in the customer's favour.

This provision seems to cover the need for impartial and transparent third party dispute resolution mechanisms and initiatives, which is needed for Tanzania e-consumers. Slight changes may be incorporated when adopting this provision. For instance, there is a need to ensure that the third party redress mechanism is also available offline, and exclusively represents the e-consumer fairly.

Moreover, e-consumers should be offered this service free. E-consumers should also be allowed to opt to go through with the service or take their complaints direct to the government established e-consumer body dealing with dispute resolution. It is essential that any dispute resolution initiatives implemented avoid bureaucracy and complicated procedures, as this is among the key reasons for failure of the current systems for general consumer protection in Tanzania. There is a need to establish new and effective mechanisms, not only to produce effective results but also to build e-consumer confidence and trust. This is vital as e-consumers need to trust a system for

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<sup>358</sup> Principal 6.4.

it to sufficiently operate.

The issue of access to justice is extensively addressed through the Code; however, not every concerned issue is covered. The Code does not address redress in cases of cross border transactions nor does it address the issue of ousting clauses. These need to be addressed to ensure satisfactory results in dispute resolution initiatives.

***Australian Guidelines for Electronic Commerce (March 2006)***

The Guidelines address the issue of access to justice by providing for internal complaint-handling procedure where businesses are required to set up internal procedures to handle consumer complaints.<sup>359</sup> This guideline is similar to the internal complaint handling procedure provision under the OECD Recommendations on Consumer Dispute Resolution and Redress. The Guideline requires the internal complaint handling procedure be within reasonable time, in a reasonable way, be free of charge to the consumer and without prejudicing the rights of the consumer to seek legal redress. The Guideline is also similar to principle 6 of the *Canadian Code of Practice for Consumer Protection in Electronic Commerce* where the requirement for easily accessible and available internal handling procedure is stated.

However, the difference in wording between all these provisions makes it worth it to discuss them here. The OECD Recommendations on Consumer Dispute Resolution and Redress are wider in perspective and extensively cover a number of issues than the provisions provided in this Guideline; however, the Guidelines have favourable conditions that are recommended for Tanzania initiatives. For instance, where the OECD Recommendations on Consumer Dispute Resolution and Redress recommend reasonable costs be charged to consumers for dispute resolution, the provisions of the Guideline recommends free of charge services. This is more fitting for third world country initiatives such as Tanzania.<sup>360</sup>

Furthermore, the provisions also require business not to prejudice the rights of the consumer to seek legal redress. This is an important provision, which is not

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<sup>359</sup> Guideline 43.

<sup>360</sup> Refer to the discussion on OECD initiatives on dispute resolution above.



specifically provided for in the OECD recommendations. The Guidelines also require businesses to provide consumers with information about the industry code of conduct to which the business is a signatory.<sup>361</sup> Compared with principle 6 of the *Canadian Code of Practice for Consumer Protection in Electronic Commerce* discussed above, the Canadian Code provides more favourable conditions for Tanzania e-consumers where it requires these redress services be available both online and offline. This is not provided for under the Australian Guidelines.

Moreover, the Australian Guidelines also provide for applicable law and forum<sup>362</sup> where it states that where a business specifies an applicable law or jurisdiction to govern any contractual disputes or a jurisdiction or forum where disputes must be determined, it should clearly and conspicuously state that information at the earliest possible stage of the consumer's interaction with the business. This is a useful provision which cannot be found under the Canadian Code. However, the provision may not sufficiently address e-consumers concern in this matter as the provision has taken a contractual approach on the issue of applicable law and forum, as it only requires consumers to be informed at the earliest stage so that they know what they are getting into. This approach will not be effective in Tanzania e-consumer protection as it does not empower and enable e-consumers to seek justice. The requirement will make the facts known to e-consumer; however, there is little they can do where the provisions on applicable law and forum provided by the businesses are not favourable. Instead, a more specific provision addressing unfair or unfavourable choice of forum and applicable law should be considered. There is a need to ensure the choice of law and forum imposed by businesses are reasonable and practical.

The difference in wordings on these provisions from OECD, Canada and Australia has made it necessary to discuss them; as all initiatives are relevant and should be considered together when trying to find solutions for Tanzanian e-consumers.

### ***Trade Practices Amendment (Australian Consumer Law) Act (No. 2) 2010***

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<sup>361</sup> *Australian Guidelines for Electronic Commerce* (March 2006) Guideline 44.

<sup>362</sup> *Ibid* Guideline 48.

The *Australian Consumer Law Act* is part of the *Competition and Consumer Act*, No 1 of 2010, which provides for general protection of consumers in Australia. Even though the Act was not specifically intended to deal with electronic transactions, especially cross border transactions, it has addressed the issue of consumer protection extensively and it is worth noting the dispute resolution efforts provided under the Act. Chapter 4 of the Act provides for criminal offences relating to certain rules provided under chapter 3 where contravening the rules carries financial penalties. The Act also provides for enforcement and remedies under chapter 5. Remedies provided by the Act include injunctions, public warning notices, compensation, and damages.

The measures taken under this Act may be a good reference for Tanzania initiatives on e-consumer protection. However, caution should be taken when imposing criminal offences for such initiatives. The role of criminal law in consumer protection should be a limited one and be used only where the wrongdoing in a transaction deserves to be treated as a criminal action; such as in fraud.

There is a need to restrict criminal actions and punishment in consumer protection as in consumer law the state's duty is to represent and impose individuals' duties in order to ensure that parties are held to their views and prevent dysfunction of the market place. Therefore, consumer protection laws must represent these aims.<sup>363</sup> It is argued that criminal law does not entail the negation of human freedom; rather, it restricts individual freedom to protect and assure that of others.<sup>364</sup> Consequently, criminal liabilities imposed on consumer protection may not always lead to desired results for a functioning market place or represent consumers' choices.

Protection through punitive laws is, however, necessary, but it should be used with

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<sup>363</sup> For further discussion on this, see Peter Cartwright, *Consumer Protection and Criminal Law: Law, Theory, and Policy in the UK* (Cambridge University Press, 2001); Krisztina Karsai, 'Consumer Protection by Criminal Law' (Paper presented as oral lecture, General Assembly of the European Law Faculties Association, Real Madrid, 2012) <[http://www.google.com.au/search?q=Krisztina+Karsai%2C+Consumer+Protection+by+Criminal+Law&sourceid=ie7&rls=com.microsoft:en-au:IE-SearchBox&ie=&oe=&redir\\_esc=&ei=ejOLUcjVHKeYiAf8-IDQBA](http://www.google.com.au/search?q=Krisztina+Karsai%2C+Consumer+Protection+by+Criminal+Law&sourceid=ie7&rls=com.microsoft:en-au:IE-SearchBox&ie=&oe=&redir_esc=&ei=ejOLUcjVHKeYiAf8-IDQBA)>; Office of Fair Trading, United Kingdom, *Framing and Enforcing Criminal Sanctions in the Regulations Implementing the Unfair Commercial Practices Directive: A Consultation Response by the Office of Fair Trading* (February 2007) <<http://uk.practicallaw.com/3-380-7381?q=&qp=&qo=&qe=>>>; Sanford H Kadish, 'Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations' (1962) 30 *University of Chicago Law Review* 423 <<http://scholarship.law.berkeley.edu/facpubs/732>>.

<sup>364</sup> Karsai, above n 363.

caution when need be. It is argued that criminal law in consumer protection should be used as a last resort (imposing the subsidiarity and *ultima ratio* principles); in that it shall apply only if the infringement of legal interests in question cannot be dealt with by way of measures of other philosophically less severe legal regulations.<sup>365</sup> In other words there is a need to define interests of consumers so valuable that even criminal law shall play an important role in their protection.<sup>366</sup>

Several bodies ensure that consumers can get redress when there is a breach of provisions of the *Australian Consumer Law Act*. These include the Australian Competition and Consumer Commission (ACCC) which is an independent government statutory authority. It has the task of ensuring that individuals and businesses comply with the competition, fair trading and consumer protection laws.<sup>367</sup>

The ACCC can bring actions in its own capacity against businesses that have breached the provisions of the *Competition and Consumer Act*, including the *Australian Consumer Law Act*. The ACCC can also accept court enforceable undertakings by virtue of section 87B of the *Competition and Consumer Act*.

A good example of ACCC involvement can be seen from its activities where between January and March 2013 it has been able to respond to 50,000 complaints and inquiries from businesses and consumers, commenced five new civil proceedings and two appeals in the Federal Court of Australia, obtained four court enforceable undertakings, secured over \$800,000 (AU) in penalties for breaches of the *Competition and Consumer Act*, received payments of \$33,000 for nine infringement notices under the *Australian Consumer Law Act*, completed 65 merger reviews, issued 12 final authorisation determinations, negotiated the recalls of over 260,000 unsafe and faulty consumer goods, reviewed notifications for 79 consumer product safety recalls and managed 46 of the recalls.<sup>368</sup>

Furthermore, the ACCC has several tools to inform and assist consumers on several

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<sup>365</sup> Ibid.

<sup>366</sup> Ibid.

<sup>367</sup> See Australian Competition & Consumer Commission (ACCC), *About the ACCC* (11 May 2013) <<http://www.accc.gov.au/about-us/australian-competition-consumer-commission/about-the-accc>>.

<sup>368</sup> ACCC, *ACCC Releases March 2013 Quarterly* (9 May 2013) <<http://www.accc.gov.au/media-release/accc-releases-march-2013-quarterly-report>>.

matters such as those regarding guarantees, warranties, refunds, internet shopping, misleading conducts, tax, pricing, medical and health services, professional services and international consumer issues. An example of such a tool is ‘SCAMwatch’, where consumers and small businesses are provided with information on how to recognise, avoid and report scams.<sup>369</sup>

There are also similar tools run by other organisations; such as ‘MoneySmart’ run by the Australian Securities and Investments Commission (ASIC), which offers free guidance to help consumers make the best choices on issues such as superannuation, banking, investing, borrowing and credit, insurance, budgeting, scams, retirement income planning and unclaimed money.<sup>370</sup>

There is also ‘Product Safety Australia’, a website run by the Australian government offering consumers information on unsafe products.<sup>371</sup> The website offers email alert services where consumers receive email alerts for new and updated content on safety of products.<sup>372</sup> Similarly, the Australia government provides product safety recall information and alerts to consumers.<sup>373</sup>

Despite all these efforts by the ACCC, the Commission is limited when it deals with issues of electronic transactions, especially cross border transactions. The ACCC advises Australian consumers that they should be aware that they may experience practical difficulties in obtaining a remedy from businesses based overseas.<sup>374</sup>

It is evident that such consumer protection system is needed for e-consumer protection in Tanzania. The activities of ACCC provide a good role model; however, the ACCC deal with matter of national and international level only and does not deal with regional or local consumer protection. Furthermore, it does not represent or mediate individual disputes.<sup>375</sup> This needs to be considered when referring to ACCC

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<sup>369</sup> See <<http://www.scamwatch.gov.au/>>.

<sup>370</sup> See <<http://moneysmart.gov.au/>>.

<sup>371</sup> See <<http://www.productsafety.gov.au/>>.

<sup>372</sup> See <<http://australia.gov.au/service/product-safety-email-alerts>>.

<sup>373</sup> See <<http://www.recalls.gov.au/>>.

<sup>374</sup> ACCC, *Shopping Online With An Overseas Business* (12 May 2013)

<<http://www.accc.gov.au/consumers/online-shopping/shopping-online>>.

<sup>375</sup> ACCC, above n 368.

initiatives for Tanzania e-consumers especially as there are no alternatives available for Tanzania e-consumers at the local level. It is important for a country such as Tanzania (with poor economic conditions and more vulnerable consumers) to have a similar system such as ACCC, which will operate all the way through to the local level. This is so as to create uniformity, similar standards and practises; where e-consumers will easily be able to identify the efforts and know where to go in case aggrieved. Furthermore, such a widespread system will not only minimise costs that may be incurred for operating different systems, but it will also ensure independency and effectiveness of the system making it more robust.

Another body ensuring that consumers can get redress for breach of provisions under the *Australian Consumer Law Act* is the Australian Office of Fair Trading (OFT).

The OFT is an entity which represents Australian consumers and businesses at a local level. Every Australian state has individual offices representing the interests of their local consumers.<sup>376</sup> OFT mediates individual cases by offering reconciliation between parties. However, it does not compel businesses or traders to take any action.<sup>377</sup> Moreover, consumers are required to exhaust other remedies before lodging a complaint with the OFT.<sup>378</sup>

Similar efforts are recommended for Tanzania e-consumers; however, they need to be adopted according to the local need. A mechanism, similar to OFT, will not be effective for Tanzania initiatives. There is a need for a mechanism that will be able to represent e-consumers even where reconciliation fails. This is not only because of the financial implications of running several mechanisms for reconciliation and redress; but also due to the need to create certainty and assurance of such intervention to e-consumers. There is a need to have a mechanism that will build trust among e-consumers and limits the red tape when seeking redress. It is for similar reasons that arises the need to carefully construe the requirement of exhaustion of local/other remedies. E-consumers should not be required to follow a bureaucratic procedure in

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<sup>376</sup> Queensland Government, *Consumer Advice, Rights and Responsibilities* (7 November 2014) <<http://www.qld.gov.au/law/your-rights/consumer-rights-complaints-and-scams/>>.

<sup>377</sup> Queensland Government, *Fair Trading* (24 December 2014)

<<http://www.fairtrading.qld.gov.au/make-a-complaint.htm>>.

<sup>378</sup> Ibid.

seeking redress, but rather there should be a system where their direct claims can be heard. There should be education and encouragement on the importance of working things out with the seller first, but this should not be mandatory.

It is vital to keep in mind the social, economic and cultural conditions of the consumers when trying to come up with initiatives that will address their concerns. For instance, in reflecting the economic conditions; it is vital to keep in mind that the lack of bargaining power and imbalance of e-consumers in the third world is far greater than for those in the first world. This is due to the fact that a large population in third world countries live below or at the marginal of poverty line, however, they have similar needs for products and services as the first world population, and most often get these products and services for the same price as those in the first world.<sup>379</sup> However, more often, the quality of products and services they receive is not the same, but inferior. Buying online is often a necessity, and not a choice that one can afford to abandon and seek other alternatives. Therefore, the tolerance, endurance and patience capabilities of third world consumers are most likely to be limited. One cannot afford to sit and wait for 45 to 60 days to 'wait and see' whether the businesses will respond to their claims or not. Studies show that customers react with anger and helplessness due to service failure<sup>380</sup> and that anger can have negative effects on dispute resolution.<sup>381</sup>

It has further been argued that in the third world, there is a pattern of inequality caused by the powerful subjugating the poor and keeping them dependent. In most cases when the poor try to stand up for themselves, they face incredible and often violent oppression from those who see their interests threatened.<sup>382</sup> This is one of the reasons that any initiatives chosen should consider the social, cultural, economic and even psychological condition of the subjects. There is a need to build a system that

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<sup>379</sup> See Allen L Hammond and C K Prahalad, 'Selling to the Poor' (2004) 142 *Foreign Policy* 30 <<http://www.jstor.org/stable/4147574>>; Aneel G Karnani, 'Fortune at the Bottom of the Pyramid: A Mirage' (April 2007) <<http://ssrn.com/abstract=914518>>.

<sup>380</sup> Shamaila Gull and Saba Iftikhar, 'Behavioral Response of Angry and Dissatisfied Customers – An Experience of Service Sector of Pakistan (2012) 3 *International Journal of Business and Social Science* 254 <[http://www.ijbssnet.com/journals/Vol\\_3\\_No\\_21\\_November\\_2012/27.pdf](http://www.ijbssnet.com/journals/Vol_3_No_21_November_2012/27.pdf)>.

<sup>381</sup> Ray Friedman, et al, 'The Positive and Negative Effects of Anger on Dispute Resolution: Evidence From Electronically Mediated Disputes' (2004) 89 *Journal of Applied Psychology* 369 <<http://mors.haas.berkeley.edu/research/anderson/PosNegEffects.pdf>>.

<sup>382</sup> Anup Shah, *Poverty Around the World* (12 November 2011) Global Issues <<http://www.globalissues.org/article/4/poverty-around-the-world#Inequalityincreasessocialtensions>>.

consumers can trust and feel represented.

### ***Electronic Communications and Transactions Act 2002 (South Africa)***

Chapter 7 of the Act provides for consumer protection where it provides for the applicability of foreign law. The provision states that the protection provided to consumers under the chapter, applies irrespective of the legal system applicable to the agreement in question. This is a useful provision, especially where e-consumers have less power to negotiate on jurisdiction matters on the transactions they enter into. This will enable them to seek redress in their local courts. This provision also deals with ousting clause to some extent as the provision will override any ousting clause denying e-consumers access to local courts.

However, there is a need to strengthen this provision further in order for it to be implemented effectively, especially within the Tanzanian scenario. There is a need to ensure that there are available effective redress mechanisms that will be able to adjudicate cross border transactions. There is also a need to have a mechanism that will represent e-consumers on cross border matters; in this way, there will be a strong representative of e-consumers who will have the affirmation and power to argue for the provision and oversee its implementation. This cannot be done by e-consumers alone, who are in a weak position; and more often lost and unaware as to what initiatives can be taken and what is available for them.

The Act goes further to provide that any provision in an agreement which excludes any rights provided for in the chapter is null and void. This is another important provision, and may also be used to address ousting clauses that intend to take away e-consumer rights. However, there is a need to reword the provision to ensure a balance as there is a danger for the provision to be used against businesses, especially where there will be a strict interpretation of the provision. In order to foster online business, it is important to have balance and ensure that the provisions enacted will not be detrimental to businesses in any way, especially in Tanzania, where the majority of businesses are small family businesses, in most cases acting as agents, and hence vulnerable and need protection themselves against the big businesses they are dealing with.

There is a need to construct the provisions in such a way that they will protect the e-consumer but at the same time will not compromise the business. For example, the above provision may be amended to read ‘any provision in an agreement which excludes any rights provided for in the chapter is unenforceable’ instead of ‘null and void’. This may give parties a chance to rectify the matter through other possible means.

The Act also provides for a venue for consumers to have their complaints heard, where it states that a consumer may lodge a complaint with the Consumer Affairs Committee in respect of any non-compliance with the provisions of this chapter by a supplier. This is important element in access for justice, a venue where complaints can be lodged. Similar elements have been pointed in discussion above; where they have extensively addressed the issue of dispute resolution bodies and representatives. As this provision is really narrow, directing complaints to one particular body, the recommendations on this area above will be taken into consideration.

The Act provides for ADR, however, this mechanism is for the resolution of disputes in respect of the of the South African domain name space only (.za).

This Act addresses the issue of access to justice; however, concerns on absence of laws and legal infrastructure are not as extensively addressed as in other initiatives such as the *Canadian Code of Practice for Consumer Protection in Electronic Commerce* and the *OECD Guidelines for Consumer Protection in the Context of Electronic Commerce*. However, the Act has addressed the issue of ousting clauses, something which is not satisfactorily given attention to in the other discussed instruments.

### ***The Computer Misuse Act 2011 (Uganda)***

This Act does not address e-consumer protection issues. However, its jurisdiction provision is worth noting for reference purposes. The Act creates computer offences and sets jurisdiction of the courts to try such offences. According to the Act, the provisions provided have effect on any person, where the offence is committed in Uganda or the computer, data or programme was in Uganda. The content of this



provision renders protection for local disputes. The Act also vests jurisdictional power to chief magistrates and other magistrates to preside over cases arising under the Act. The effect of this will be for all disputes arising from the Act to be channelled through courts of law.

Even though these provisions render access to justice, they are not favourable for e-consumer transactions. Adopting such provisions for e-consumer protection would mean that e-consumers will have to take their disagreements to courts of law, as no other alternative is offered; and also e-consumers will have little or no protection on cross border transactions as the provisions only cover local transactions.

It is noted here that issues of multi-jurisdiction/cross border transactions and enforceability have also been taken into consideration in this part of discussion so as to avoid repetition which would have occurred if they were discussed under separate headings.

#### **6.4.2 Consumer to consumer (C2C) online transactions**

The fact that there are no specific provisions addressing issues arising in social networks, forums and blogs, and the impact of this reality has been pointed out in several discussions in this thesis. Similarly, the current concerns of the present state of a lack of C2C protection have been highlighted.<sup>383</sup> These concerns have pointed out the new emerging challenges in consumer protection, especially the C2C transactions and the need to address such challenges.<sup>384</sup> An extensive discussion of C2C concerns is carried out under chapter two of this thesis.

However, it is noted that the ongoing discussion on emergence of C2C concerns is not exhaustive. Several issues concerning consumers engaging in social networks and blogs are yet to be raised. This was taken into consideration while discussing

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<sup>383</sup> Refer to discussion on the rationale of protecting consumers in Chapter Two.

<sup>384</sup> OECD, 'Conference on Empowering E-consumers: Strengthening Consumer Protection in the Internet Economy' (Background Report, OECD, 8-10 December 2009) <<http://www.oecd.org/ict/econsumerconference/44047583.pdf>>; Federal Trade Commission, *Protecting Consumers in the Next Tech-ade: A Report by the Staff of the Federal Trade Commission* (March 2008) 2 <<http://www.ftc.gov/os/2008/03/P064101tech.pdf>>.

available consumer initiatives on this chapter.

Issues concerning both C2C transactions and SMEs have been highlighted in the discussion above while discussing available initiatives to B2C transactions. This offered an opportunity to reflect how the available law may protect or may be used to protect e-consumers in C2C transactions. The discussion considered how well the initiatives identified affect C2C and SMEs concerns. The discussion on C2C transactions will not be carried out further here to avoid repetition; however, it is still essential to mention it here so as to emphasise the importance of specific measures to address these concerns.

The available discussion on e-consumer concerns needs to be adopted and extended by all countries, including Tanzania. Specific regulating provisions, education on the matter, adjudicating venues and means of enforcements need to be offered so as to further protection among C2C e-consumers and also SMEs.

## CHAPTER SEVEN

*All this shows that the flowing tide of Community law is coming in fast... so much so that we have to learn to be amphibious if we wish to keep our heads above water.*

*Lord Denning MR<sup>1</sup>*

### 7. RECOMMENDATIONS AND CONCLUSION

#### 7.1 CONCLUSION

##### **7.1.1 Introduction**

The prime purpose of this study is to examine and determine the protection of consumers who transact in electronic commerce (e-consumers) in Tanzania. This was done through assessing the adequacy of regulatory frameworks and legal measures available for their protection.

The study is premised on the propositions that (1) the existing consumer protection laws are inadequate and insufficient to protect e-consumers in Tanzania; (2) the integration of electronic commerce (e-commerce) and mobile commerce (m-commerce) in Tanzania and the distinctive paradigm it has created have not been recognised by the lawmakers, and so have not been addressed; (3) the current legal framework of consumer protection in Tanzania had not foreseen the problems that would be brought about as a result of advances in technology and is therefore not broad enough to adequately protect e-consumers; (4) the existing consumer protection laws do not recognise the current major role players in the field of e-commerce, including electronic consumers who engage in Consumer to Consumer transactions (C2C e-consumers) and Small and medium-sized enterprises (SMEs), consequently, their needs are not addressed; (5) the new transactional arenas of commerce such as social media and social networks are not recognised; (6) there is little effort and few

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<sup>1</sup> *Shields v E Coomes (Holdings) Ltd* [1979] 1 All ER 456, 462.

initiatives which have been undertaken to sufficiently protect e-consumers in Tanzania; (7) the nature and context of problems facing e-consumers in Tanzania are complex, unique and heavily influenced by cultural and social practices of the society. As a result, the available international measures addressing e-consumer protection may be unsatisfactory and may cause uncertainty if adopted to address e-consumers' problems in Tanzania as such measures need to fit the local context; (8) there is a lack of sufficient means for e-consumers in Tanzania to seek justice and enforce their rights; the current legal system does not ensure justice for all, moreover, those who are able to seek justice have no guarantee of the enforcement of their rights.

### **7.1.2 The study**

The research problems were considered over seven chapters of the thesis. Chapter One pointed out the lack of Tanzanian literature on the subject. Most of the literature written by Tanzanian authors or addressing Tanzania problems were Master's theses and articles. Only two books were identified: one discussed the electronic transaction and the law of evidence principles in Tanzania and the other discussed information technology in general. Similarly, there is also scarce literature from other jurisdictions that addresses the problems of Tanzania that were raised in the thesis.

Chapter Two focused on consumer protection in an era of advanced technology. New concerns that have arisen with the advance in commerce were pointed out. Similarly features and social practices that encompass e-commerce in Tanzania were also underlined. It was shown in this chapter that there are unique characteristics in Tanzania that resulted from social and economic conditions. Among these features is the integration of e-commerce and m-commerce, where the same transaction is conducted simultaneously through e-commerce and m-commerce. It is common to have transactions initiated through e-commerce and concluded through m-commerce.

This practice is much influenced by the social and economic conditions of the country; and accessibility and availability of e-commerce services, m-commerce services and payment systems. The majority of e-consumers in Tanzania are unbanked consumers. This phenomenon is used to describe those who do not access banking services, and does not necessarily mean that they are poor, as the unbanked includes business

owners, sellers, workers and well paid employees. The unbanked consumers in Tanzania reflect the lack of banking opportunities and services that the majority of Tanzanians face due to such reasons as the high cost of banking services, absence of banking facilities, geographical inaccessibility, lack of infrastructure and a lack of consumer protection.

Consequently, the nature of e-commerce is shaped to facilitate the needs and the gaps present among these communities. One major feature facilitating the electronic transaction is M-pesa (Tigo pesa, Airtel money, Z-pesa). These are mobile phone financial facilities that facilitate e-commerce in Tanzania. Other modes of payments such as money wire transfers are also being used.

Together with the unbanked, there are also unwired consumers. This phenomenon refers to the community who lack cable internet and telephone services but instead depend on mobile phones. Many consumers in Tanzania surf through the internet from their mobile devices or are enabled through their mobile devices. The mobile boom in Tanzania penetrates the whole country reaching rural and otherwise inaccessible areas. Similarly to the unbanked phenomenon, the unwired does not classify the poor. Businesses, traders and sellers may also be unwired. The unbanked and unwired engage fully in e-commerce and m-commerce in Tanzania.

All of these leave e-consumers in more vulnerable positions when they trade electronically. The discussion in Chapter Two highlighted more e-commerce features unique to Tanzanian consumers, and emphasised the need to enact new measures that will consider the local context.

Chapter Three underlined the concerns that general and e-consumers face in Tanzania. The discussion revealed that there is a failure of consumer protection in almost all available sectors despite the presence of regulatory measures. It was revealed that the available consumer protection system in Tanzania is ineffective and little protection is rendered to consumers. The discussion highlighted new violations arising with the development of e-commerce in Tanzania and analysed how the current failing consumer initiatives are not able to regulate these concerns.

It was elaborated that laws which are not effective in offline transactions cannot effectively address online violations. These measures will not have desirable results if engaged to protect online consumers. Even in the case that the available offline laws and system in Tanzania are effective, it is highly likely that they would not be adequate in the online world. This is due to new features and violations that have emerged, and the current social and economic conditions which are major driving factors of e-commerce in Tanzania. All of these were not foreseen before and therefore have not been addressed by the available laws. Moreover, the available laws lack an international perspective which is a vital element in today's borderless world of commerce.

As e-commerce in Tanzania is much integrated with m-commerce, it was necessary to highlight the protections of m-commerce and mobile phone consumers and how it affects e-commerce consumers in Tanzania. This discussion was carried out in Chapter Four of the thesis. The discussion revealed new practices and features occurring in m-commerce when applied in exclusive and also when it is integrated with e-commerce. These features and practices are also unique to Tanzania consumers and reflect social, economic and cultural practises. An instance of this is the application of the spirit of Ubuntu, a cultural phenomenon among societies in Tanzania, in mobile phone uses and how it sets new perspectives in mobile phone consumer protection. The discussion went on to highlight new concerns that consumers face.

Chapter Five proceeded to highlight the available laws and initiatives addressing e-consumer transactions in Tanzania. It was revealed that there is a lack of sufficient laws addressing e-consumers' problems in the country. The available general consumer protection laws and the extent to which they protect e-consumers were discussed. The discussion revealed that the available measures are not adequate for both general and e-consumers.

The discussion further revealed that there is a lack of watchdogs for e-consumer affairs, insufficient legal and social assistance to e-consumers and insufficient government initiatives in protecting e-consumers. There are no e-consumer tribunals or ombudsmen that can look at e-consumer complaints and there is no government

legal aid for e-consumers. Consequently, there is no protection rendered to e-consumers.

Further discussion was carried out on the available e-consumer protection measures and initiatives available in other jurisdictions. This discussion was carried out in Chapter Six of the thesis where measures available at both a national and international level were analysed for adoption and application in Tanzania. Several international instruments including the *UNCITRAL Model Law on Electronic Commerce*, the *OECD Guidelines for Consumer Protection in the Context of Electronic Commerce*, the *EU Directive on Electronic Commerce* and the *United Nations Convention on the Use of Electronic Communications in International Contracts* were analysed. The discussion also analysed initiatives from national jurisdictions including Australia, Canada, South Africa, Uganda and Mauritius.

A number of fundamental observations and gaps were identified through this analysis. It was revealed that most of the African countries have not sufficiently addressed the issue of e-consumer protection. It was also discovered that the available measures at both a national and international level have not sufficiently addressed all concerns regarding e-consumer protection. Furthermore, it was noted that in some instances the available initiatives from different jurisdictions are similar with only slight differences in the wording of the provisions. This is due to the fact that the jurisdictions at the national level have adopted international instruments setting guidelines and directives on how to deal with e-commerce concerns.

It was also noted that new concerns that have emerged with further growth on e-commerce have not been addressed. In some cases, initial measures and recommendations are underway. One such area receiving little attention is the protection of e-consumers in consumer to consumer transactions. The same can also be said in interoperability issues and dispute resolution on cross border disputes. As initiatives at the national level are much influenced by measures available at an international level, these issues are also insufficiently addressed at national levels.

Among the major findings was the fact that the available legal initiatives do not cover the local context of e-commerce concerns in Tanzania and in some instances there is a

likelihood of causing further concerns if the available international and national measures are adopted to address e-consumer protection issues arising in Tanzania. The need to adapt available provisions with regard to social, economic and cultural practices of the country in order to have sufficient and effective measures was elaborated.

It was evident from this chapter that the current problem of e-consumer protection in Tanzania will sufficiently be addressed by new initiatives and measures that have not been addressed by both national and international jurisdictions; measures that will be in accordance with the social context of Tanzania e-consumers. The study emphasises a need for independent initiatives from other general consumer protection measures in the country. This is important so as to enable the country to leap forward and catch up with the rest of the world as far as e-consumer protection is concerned. Tanzania e-consumers are moving at the same pace with the rest of the world, transacting electronically both at a national and international level. The danger of leaving behind general consumers, who are rendered with unsatisfactory consumer protection measures is apparent, however, the study has recommendations for this including a review of the available laws, overhauling the current system and recommendations for further future studies so as to identify the reason for failure and factors for success.

### **7.1.3 Conclusion**

This study highlighted the development of e-commerce in Tanzania where it was noted that e-commerce in the country has developed in its own particular way; reflecting and adopting the level of development and socio-economic activities in Tanzania. Online commerce and m-commerce are often merged into one inseparable transaction for both national and international transactions.

The study revealed a lack of measures which protect e-consumers in Tanzania and insufficient general consumer protection initiatives. It also revealed a lack of comprehensive address on some of the issues in other national and international jurisdictions, and the measures available in these jurisdictions may not be effective in the local context. Finally the study recommends solutions that will ensure effective protection of e-consumers.



## 7.2 RECOMMENDATIONS

### **7.2.1 General recommendations**

It is revealed in this study that the current general situation on consumer protection in Tanzania is not satisfactory and needs extensive reform so as to reach the desirable standards in consumer protection. There are no specific measures tailored to protect consumers who engage in e-commerce. Consequently, e-consumers and m-consumers (herein referred as e-consumers) in Tanzania are not protected. Several measures need to be taken so as to address the issue.

One major step that needs to be taken is to establish an e-consumer protection initiative that is independent of the current general consumer protection initiatives. This should include specific laws and regulations that will address the current concerns that face e-consumers as pointed out in the study. It should also include a system where e-consumers are fully represented. The process of establishing and running it should include all players and perspectives in the country, including e-consumer watchdogs, representatives, dispute resolution bodies and all other channels that are necessary for ensuring comprehensive and effective e-consumer protection. Moreover, it should also include consumers who have experienced online malpractices, small businesses who have been in a compromised situation due to their weaker position, sellers and even reformed fraudsters who may have a better insight into human behavior when it comes to fraud especially e-commerce fraud.

It is vital to have this new and independent initiative for e-consumer protection because the current system is ineffective and renders little protection to consumers. It needs drastic measures and possibly an overhaul of the laws, procedures and its implementations. E-commerce is an area involving complex concerns, therefore adding these concerns to the current system of consumer protection adds more burden to the system with less likelihood for satisfactory protection of e-consumers. As elaborated in the study, current problems facing e-consumers cannot be sufficiently presented in the current consumer protection system.

Furthermore, there is a need for the country to move forward and catch up with the rest of the world in the area of consumer protection. This needs to be done in the e-consumer protection area as it is no longer a national problem due to the cross border nature of e-commerce; e-consumer protection of one country has an impact on e-consumers of other countries.

The country cannot stop to fix the general consumer protection situation before moving forward, because this will only result in being left further behind in e-consumer protection. Instead measures should be taken to protect e-consumer in the current situation, while necessary steps are also taken to tackle general consumer protection issues.

Therefore, it is imperative that the Tanzania government enact separate and comprehensive consumer protection initiatives for e-consumers. There should be a specific body with special interests to serve those who engage in e-commerce and its integrated m-commerce.

It is important that the service offered by this body include free services to the whole community, ensuring easy and quick access with no cumbersome procedures.

There is a need for government to be proactive in addressing issues concerning e-consumer protection and even general consumer protection. The online world of commerce changes rapidly and develops at high speed.

There is also a need for the government to establish and coordinate financial services or a system for e-commerce in Tanzania. This can be done in several ways, including establishing a totally independent financial service that will reach all e-consumers in the country. This service should adopt the current working financial means rendered to consumers such as mobile money. This is a more accurate way to handle financial concerns arising through e-commerce; but it may prove expensive and a long-term project for the government. Therefore, the government may adopt another way in dealing with the issue. This should involve coordinating and regulating financial and payment facilities for e-commerce in the country. This may include regulations and

watchdogs for e-commerce financial facilities. These should be part of the new established e-consumer protection system.

The government should develop educational initiatives for both e-consumers and e-sellers on their rights, obligations and available protections. This should also be incorporated in the new protection initiatives so that a special department will be dedicated to educating consumers and sellers all over the country. In order for this initiative to be effective, the means and manner of this education needs to go beyond the norm. The key in this will be to impart knowledge to consumers so that they can make informed choices. This is different from providing consumers with information, which is most likely to deliver little effect.

Examples can be derived from other successful government initiatives in imparting knowledge to its citizens such as the malaria and HIV/AIDS campaign. Consumer education can be offered through similar modes of the abovementioned campaigns to ensure the efforts reach all citizens and both e-consumers and sellers. Moreover, educational information may be offered in the forms of banners through websites and in the form of visual means such as in YouTube videos or/and pictures and audios in blogs and social medias.

The education offered to consumers should range from consumer protection education to general knowledge that is important and integrated with e-commerce.

The government should also work together with international initiatives and other countries in addressing cross border concerns. There is a need for the government to join regional and other networks available that recognise e-consumer protection. A key element in such efforts would be to enter into bilateral and multilateral agreements with other jurisdictions so as to further promote e-commerce and e-consumer protection. Such agreements are important when dealing with issues such as dispute resolutions. Much emphasis should be given to enacting measures with regional integration which are country specific and tailored to address explicit issues facing each country within the region. It is suggested from the finding of this thesis that the addressing of e-consumer protection in general will not render full protection to Tanzania e-consumers.

The government should also facilitate independent consumer protection organisations so as to ensure accountability, transparency and fair play in the whole system of e-consumer protection.

The government needs to embark on intensive research and take extensive measures to identify factors that are weakening the current consumer protection initiatives and measures that need to be taken in order to make the system work effectively. This is necessary so as to ensure that all consumers in the country are afforded effective consumer protection.

### **7.2.2 *Specific recommendations***

There should be enacted a comprehensive law to facilitate e-commerce and e-consumer protection. Provisions suggested for adoption in this study may serve as guidelines and guidance towards such a law. There is a need to enact strong e-consumer legislation which will safeguard e-consumers' rights, and offer possible guidance on the rights of general consumers. The legalisation needs to be specific, precise and streamlined to avoid cumbersome requirements; such as requiring the unnecessary collection of information, storage or disclosure of information. It should also simplify ways and means through which e-consumers can seek their rights and justice. It is essential that cumbersome requirements are avoided. Most of all, there should be an established venue for e-consumers where they can seek their rights.

There should be enacted government and independent bodies to facilitate, regulate, adjudicate and act as watchdogs for e-commerce and e-consumer protection. The recommendations of the structure of such organisations given in the study should be taken into consideration.

Moreover, the government needs to cooperate with the private sector and organisations in order to enhance e-consumer welfare. This cooperation will provide a good opportunity for government to impose required standards of e-consumer protection and possibly get assistance from the private sector. The private sector may act as watchdogs in e-consumer affairs and play a major role in facilitating e-

commerce and its smooth operation in the country since they play major roles in e-commerce facilitation. For instance, the government should work with private infrastructure service providers such as transport service owners who play the role of both courier and postal service in the country. There is a need to ensure standards and provide assurance to consumers even where such services are carried out by the private sector.

The government should enact initiatives to assist local businesses and traders who act as importers and agents in the country. The majority of goods offered through e-commerce are imported from overseas by local businesses that are limited in resources and cannot effectively represent consumers in seeking their rights from manufacturers or original sellers in cases where things go wrong. There is a need to have some means that will enable easy and successful representation of e-consumers in such cases.

There is a need to enact provisions which will have protection perspective for small businesses in the country. There is a need to identify the position, responsibilities and obligations of small businesses, from a consumer protection perspective, when they deal with major businesses, other small businesses and individual e-consumers.

There is a need for recognition and identification of C2C e-businesses and the media in which they take place. Identification of the position, responsibilities and obligations of major role players in this arena is vital. It is essential that e-consumer initiatives acknowledge, clearly classify C2C e-transactions and map out the mode in which they should be operating. There is a need for a legal framework which will set out the rules governing their operations and ensure consumers are aware of which framework governs transactions of this nature. The initiatives governing C2C e-transactions need to specify responsibilities and obligations of businesses engaging in these transactions through sales; which should be differentiated from the businesses' involvement in transactions through sponsorship, advertisements and other auxiliary activities.

Moreover, concerns facing C2C e-consumers which are similar to those facing B2C e-consumers such as fraud, misleading conducts, non-delivery, late delivery and so forth, need to be specifically addressed from a C2C perspective. Even though the

concerns are similar in both modes of transactions, that is, C2C and B2C e-transactions, they need different solutions due to the different nature of these transactions. For instance, in C2C e-transactions, it is not always the case that the seller delivers goods, instead, the buyer might have obligations to pick up the goods, and needs to do so in a reasonable timeframe. Payment concerns also need to be addressed from the perspective of the nature of C2C transactions. For instance, in cases where payments have been made in the form of 'cash on delivery', measures governing B2C payment disputes will not be useful, rather, it needs particular measures which will address payment disputes where payments have been made in such mode. For instance, handing over the goods to the buyer may be one example of evidence or acknowledgement that the seller has been paid.

It is important to ensure that regulations on C2C e-transactions are strict enough to address e-consumer violations, but yet easy enough to accommodate the non-business nature of C2C e-transactions. The core of these transactions, which is individuals disposing of items they no longer need to their fellow individuals, need to be retained. The informal and laid back nature of these transactions is one of its main characteristics and should not be disrupted by regulations. E-consumers who are selling through social media should be able to advertise their goods, have an immediate response from buyers and conclude a transaction without worrying about what procedures the laws require them to follow. In this respect what is needed more in regulatory form is ensuring that C2C e-consumers are well informed about the nature of these transactions and that they are educated on how C2C transactions work.

C2C e-consumers should be made aware of the need to provide thorough and factually substantiated information regarding goods or services they offer for sale through social media, and how to avoid giving misleading information. Similarly, C2C e-consumers should be educated on how to construe the information given and be able to differentiate exaggerated truth, puffery and mere hearsay. It is essential that C2C initiatives realise the need for equal protection of both parties, especially where parties in these transactions are in a more or less equal position with equal bargaining powers, no asymmetry of information and facing similar vulnerabilities.

There is also a need to have specific dispute settlement mechanisms which address C2C e-transactions. The mode of dispute mechanism in C2C e-transactions should be different from that of B2C transactions due to the characteristics of the former. The mechanisms in C2C e-transactions should be less formal, involving a shorter timeframe and with a greater focus on amicable settlements and the capacity to restore situations to where they were before. This is more so in the case where such transactions occur through social media and networks or similarly unregulated sites. A slighter strict approach should be taken where such transactions occur in a more structured and supervised venue such as through online auction websites. Moreover, a stricter approach also needs to be taken when dealing with C2C e-consumers in cross border transactions.

The government also needs to ensure that e-consumers have access to specific dispute settlement mechanisms which are easy to access and free. This mechanism should consider the specific factors and social context surrounding Tanzania e-consumers. It should also be effective in addressing concerns surrounding e-transactions.

There is also a need to improve and to enact new payment systems for e-transactions. It is recognised that improving current payment systems in the country will need addressing as some of the payment services are integrated, such as mobile phone payments. However, there is a need for special emphasis where such services involve e-consumers. This can specifically be embedded in e-consumer legislation, while at the same time taking into consideration the integration and keeping in mind the need to address the whole area. Moreover, new e-commerce and e-payment systems are necessary in order to enhance e-consumer welfare.

In order to render effective protection to e-consumers and consumers in general, the government needs to exert special commitment in the information technology and e-commerce area. This will keep the government informed of the new issues in information technology area and e-commerce, and enable them to address such concerns as soon as they arise.

It is essential the government keeps technological developments and its consequences in mind whenever they review or amend available legislations in the country. The

government should aim to incorporate cyber and online issues in all aspects of the law so as to keep pace with the developments in the world today.

The Tanzanian government needs to undertake special measures to address the technological gap and the digital divide, not only those facing the first and third worlds but also the gap facing its own citizens. This is crucial not only for the welfare of e-consumers but the whole country at large. There is a lot to be done in order for this to be achieved. In order to narrow the gap within the country, the government needs to ensure equal opportunities for all its citizens, in both rural and urban areas. There is a need to provide several social services such as accessibility to road and transportation systems and availability of home addresses and postal services to all. Also enhancing market availability to both rural and urban areas, and educating citizens not only in consumer rights but technology in general may be other measures that can be taken to address the digital divide in the country.

### 7.3 CLOSING REMARKS

It is evident through this work that there is a need to protect e-consumers in Tanzania. The uniqueness of e-commerce in Tanzania makes it necessary to have a special address which considers the local context. Moreover, these initiatives need to consider the new emerging practices and key players of e-commerce, and recognise the position of SMEs and parties in C2C e-transactions, especially those in social media and social networks. One clear factor which the initiatives need to take into account when addressing both B2C and C2C e-consumers protection is that the traditional causes and reasoning of market failures may not necessarily be the same in these transactions. Therefore, the phenomenon of market failure needs to be revisited and redefined so as to better address e-consumer concerns.

E-consumer protection is ongoing as new features and practices develop every day. This thesis has discussed many issues in this area; however, there is still room for further research. A good example of what is needed for future action is addressing general consumer protection in Tanzania. It is essential to have an effective and comprehensive general consumer protection system in Tanzania in order to complement the protection of e-consumers. This thesis has recommended a separate



system for e-consumer protection to ensure that the country is not left behind and e-consumers are effectively protected. However, a future study should consider what needs to be done within the general consumer protection arena so that there is comprehensive consumer protection system for all in the country.

Another area that accords future study is that of dispute resolution. Whereas the thesis has exhausted the discussion of dispute resolution for e-consumers at the local level, there is still room for discussion on dispute resolution in cross border transactions. This fact is highlighted further with the ongoing efforts of the UNCITRAL Committee under the UN Working Group for Online Dispute Resolution (ODR) of cross border e-commerce transactions where rules to govern ODR are being developed. Harmonising these rules in the local context and enacting ODR initiatives for Tanzania is one area that calls for future work.

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